Special Issue
EU Citizenship: Twenty Years On

Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation

By Christian Joerges[*]

A. Introduction

The European Union rides through troubled waters. Its original reliance on law as the object and agent of the integration project and on the "economic constitution," which the Economic and Monetary Union (EMU)—as accomplished by the Treaty of Maastricht—expected to complete, have proven unsustainable. Following the financial and sovereign debt crises, individuals perceive the EMU, with its commitments to price stability and monetary politics, as a failed construction precisely because of its reliance on inflexible rules. The European crisis management seeks to compensate for these failures by means of regulatory machinery which disregards the European order of competences, takes power from national institutions, and burdens—in particular—Southern Europe with austerity measures; it establishes pan-European commitments to budgetary discipline and macroeconomic balancing. This abolishes the ideal of a legal ordering of the European economy, while the economic and social prospects of these efforts appear gloomy and the Union's political legitimacy becomes precarious. A fictitious debate between Carl Schmitt and Jürgen Habermas addresses the present critical constellation, where a number of Schmittian notions seem alarmingly realistic. This essay pleads for a more modest Europe committing itself to "unity in diversity," the motto of the ill-fated Constitutional Treaty of 2003.

[*] University of Bremen, Research Professor; Co-Director, Centre of European Law and Politics, University of Bremen; Senior Professor for Law and Society, Hertie School of Governance, Berlin. E-mail: Christian.Joerges@Sfb597.Uni-Bremen.de; Joerges@Hertie-School.org. Earlier versions of this paper have been presented on Mar. 22, 2012 at the Centre for Transnational Studies at the University of Bremen, on Nov. 8, 2012 at the Trentième anniversaire de l'Association internationale de droit économique in Wroclaw, Poland, and on Jan. 15, 2013 at the Centre for European Law and Governance at the University of Amsterdam. The argument developed further with each presentation. The present text has been developed further subsequent to the citizenship conference in Uppsala on Mar. 21–22, 2013. I am indebted to the discussants at these occasions, not exclusively, but, in particular, to Jonathan Zeitlin and Patricia Mindus. A first elaboration of the argument ("Europas Wirtschaftsverfassung in der Krise") was published in (2012) 51 *Der Staat*, 357–38 and the translation by Sandra H. Lustig, Hamburg, and Matthew G. Harris, Buchen/Odw., in the ZenTra Working Papers in Transnational Studies No. 6/2012. In the course of these revisions, the text has not only increased in size but also been elaborated considerably. I wish to thank Chris Engert, Florence, for his linguistic assistance and editorial help.

B. Preliminary Note on the Course of the Debate

Europe faces troubling times. Constructive suggestions—such as the federal finality that Joschka Fischer sought to promote in his legendary lecture at the Humboldt University in Berlin[1] more than ten years ago—no longer sound credible. They now stand in contrast with the endless and frenzied crisis management that has placed its stamp of rigid austerity policy on the "periphery" of what was to evolve into an "ever closer Union." The rule of law and the project of "integration through law" are at stake, concepts which characterized and connected European law scholarship transnationally[2] in the formative phase of the integration project and for a good while thereafter. Europe is far from hosting "the most competitive, knowledge-based economy in the world" as the Lisbon Council proclaimed in the year 2000;[3] its economy stands at the core of the present crisis. European constitutionalism, which dominated academic discussions for a decade and thoroughly neglected the inherently political dimensions of the "Economic," has been silenced.

Paradoxically, the same holds true for Germany's Ordo-liberalism and its project of an "economic constitution." According to this school of thought, the legitimacy of the European project rested upon the legal ordering of the economy,[4] the economic freedoms of the EEC Treaty—a system of undistorted competition—and an economic policy "complying with justiciable criteria."[5] These stood as the potential cornerstones of this order, to orient the integration process in a way by which the European polity would be legitimized by—and reduced to—an economic *ordo* whose validity did not depend upon

[1] Joschka Fischer, *Vom Staatenverbund zur Föderation—Gedanken über die Finalität der europäischen Integration [From Confederacy to Federation: Thoughts on the Finality of European Integration]* (May 12, 2000), http://whi-berlin.de/documents/fischer.pdf. *See also* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER (Christian Joerges et al. eds., 2000) (illustrating how widely the lecture was noted).

[2] A chapter from Joseph H.H. Weiler's Ph.D. thesis was ground-breaking, see Joseph H.H. Weiler, *The Community System: The Dual Character of Suprenationalism*, 1 Y.B. EUR. L. 257–306 (1981), and then the seminal work he orchestrated, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1985).

[3] *See* Presidency Conclusions of the Lisbon Council of Mar. 23–24 2000, EUR. PARL. DOC., http://www.europarl.europa.eu/summits/lis1_en.htm.

[4] *See* Christian Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461, 465 (2005); Christian Joerges, *Europa nach dem Ordoliberalismus: Eine Philippika*, 43 KRITISCHE JUSTIZ 394 (2010).

[5] Ernst-Joachim Mestmäcker, *Macht-Recht-Wirtschaftsverfassun*, 137 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 97, 106 (1973). The essay is the elaboration of the lecture which he have at the Verein für Socialpolitik conference in Bonn in 1972. Ernst-Joachim Mestmäcker, *Power, Law and Economic Constitution*, 11 GERMAN ECON. REV. 177–192 (1973).

democratic credentials, let alone upon the transformation of Europe into a fully-fledged federal state.[6]

This idea guided and accompanied Ordo-liberalism's path to Europe. Nobody championed or developed it more consistently than Ernst-Joachim Mestmäcker. One of his seminal essays explained that the pressure to harmonize, stemming from integration, would become stronger.[7] A Common Monetary Policy would mean "ultimately giving up" the opportunity to maintain far-reaching differences between the economic orders.[8]

The Community for which the original ordo-liberal concepts were conceived—and to which Mestmäcker referred—looks nothing less than idyllic from today's perspective. It was both smaller and more homogeneous than the current Union. For this reason alone, the incorporation of the project of integration through law, particularly its commitments to a legal ordering of economic policy (*Ordnungspolitik*), no longer seem viable. By now, individuals see the symptoms of a deep crisis and the necessity for developing new perspectives for the European project appears irrefutable. One cannot reverse the course of history, but one can analyze and try to understand how and why the configuration of the relationship between law and politics in the integration project has contributed to the "integration failure" which we are now witnessing in the current crisis. This essay proceeds in five steps.

The first step, taken somewhat in haste, concerns the Weberian notion of the nation-state and its pursuit of power through economic strength. The second involves the taming of the self-same nation-state by law and the de-coupling of the European economic constitution from the labor and social constitutions of the nation-states, which presents itself to the one—Ordo-liberal—side as nothing but a logical implication of the establishment of a European economic order, while other political quarters perceive this disconnection as a threat to the legacy of the welfare state. This is followed by an analysis of the various

---

[6] *See* MILÈNE WEGMANN, FRÜHER NEOLIBERALISMUS UND EUROPÄISCHE INTEGRATION (2002) (re-constructing this scenario thoroughly). Her work corresponds instructively to Wolfgang Fikentscher's earlier *magnum opus* on *Wirtschaftsrecht* (economic law). *Id.* Decades before the studies on global governance, European governance, the relation between the levels and the impact of transnational governance on national statehood became *en vogue* in political science, and "constitutionalism beyond the state" became everybody's concern in legal scholarship, Fikentscher had conceptualized WIRTSCHAFTSRECHT (1983) in truly transnational and constitutional perspectives, and composed the two monumental volumes accordingly: The first volume is dedicated to *Weltwirtschaftsrecht* (world economic law) and *Europäisches Wirtschaftsrecht* (European economic law); national economic law (*Deutsches Wirtschaftsrecht*) is presented upon this basis. This conceptualization documents the truly universalist commitments of the ordo-liberal tradition which Wegmann emphasises in her reconstruction of the ordo-liberal tradition.

[7] Ernst-Joachim Mestmäcker, Address at the Verein für Socialpolitik Conference: Macht-Recht-Wirtschaftsverfassung [Power-Law-Economic Constitution] (1972); Mestmäcker, *supra* note 5, at 109.

[8] Mestmäcker, *supra* note 5, at 109.

dimensions of the integration project's problems, referring to Karl Polanyi's economic sociology. The next section elaborates on these remarks, dealing with the establishment and the crisis of Europe's EMU and including an overview of Europe's new "crisis law" and its assessment by the German Constitutional Court (FCC) and the Court of Justice of the European Union (CJEU). The dramatic nature of our current situation will then be illustrated by means of a fictitious debate between Carl Schmitt and Jürgen Habermas. In the analysis of this debate, Carl Schmitt's theorems will prove to be frighteningly realistic: "But where danger threatens, that which saves from it also grows."[9] What kind of regime did Europe impose on itself, and what does this mean for European citizenship? These challenges will be addressed in the Epilogue, which will also tentatively consider an alternative vision to both the frightening as well as the possibly merely voluntarist scenarios on the future of the European integration project.

C. Max Weber's *Nationalstaat*

The steps towards European integration after World War II document how we overcame our bellicose past. At the same time, the designers of the project wanted to rein in the economic militancy of the nation-state. Max Weber formulated his perception of that nation-state in his 1895 inaugural Freiburg address as follows:

> Our successors will not hold us responsible before history for the kind of economic organization we hand over to them, but rather for the amount of elbow-room we conquer for them in the world and leave behind us. Processes of economic development are in the final analysis also power struggles, and the ultimate and decisive interests at whose service economic policy must place itself are the interests of national power, where these interests are in question. The science of political economy is a political science. It is a servant of politics, not the day-to-day politics of the individuals and classes who happen to be ruling at a particular time, but the lasting power-political interests of the nation. And for us the national state is not, as some people believe, an indeterminate entity raised higher and higher into the clouds in proportion as one clothes its nature in mystical darkness, but the temporal power-organization of the nation, and in this national

[9] FRIEDRICH HÖLDERLIN, PATMOS DEM LANDGRAFEN VON HOMBURG ÜBERREICHTE HANDSCHRIFT (1802), *quoted in* FRIEDRICH HÖDERLIN WERKE 379 (1954), *translated in* MICHAEL HAMBURGER, FRIEDRICH HÖLDERLIN, SELECTED POEMS AND FRAGMENTS 243 (1994).

> state the ultimate standard of value for economic policy is "reason of state". There is a strange misinterpretation of this view current to the effect that we advocate "state assistance" instead of "self-help:, state regulation of economic life instead of the free play of economic forces. We do not. Rather we wish under this slogan of "reason of state" to raise the demand that for questions of German economic policy—including the question of whether, and how far, the state should intervene in economic life, and when it should rather untie the economic forces of the nation and tear down the barriers in the way of their free development—the ultimate and decisive voice should be that of the economic and political interests of our nation's power, and the vehicle of that power, the German national state.[10]

"It was not the agreement of many audience members with the following remarks, but their dissent that prompted me to publish them," Weber wrote in the preliminary notes to the publication of his lecture.[11] This text has weathered these concerns well. He developed a profoundly thought-through in terms of economic theory, sociology, and history, and—despite all its jingoistic pronouncements—also stands as a critique of the lack of political capacity of the German political class.[12] The martial tone of Weber's lecture clearly spells out a target of the European project as people understood it later, particularly in Freiburg when that city had become the intellectual *Heimat* of the Ordo-liberal School.

D. The Civilizing Accomplishment and Asymmetry of the EEC Treaty

In his seminal lecture of 1972, Mestmäcker has explained succinctly how Ordo-liberalism has liberated itself from the legacy of Weber's *Nationalstaat.* He stated:

> What is historic about the EEC Treaty is that it integrates the internationality of economic relationships into the internationality of law and political institutions. In this sense, the EEC Treaty

[10] Max Weber, *The National State and Economic Policy (Freiburg Address)*, 9 ECON. & SOC'Y 428, 438 (Ben Fowkes trans., 1980) (1895).

[11] Max Weber, Inaugural Lecture at Freiburg: Der Nationalstaat und die Volkswirtschaftspolitik (May 1895), at 1–2.

[12] *See* Rita Aldenhoff, *Nationalökonomie, Nationalstaat und Werturteile. Wissenschaftskritik in Max Webers Freiburger Antrittsrede im Kontext der Wissenschaftsdebatten in den 1890er Jahren*, *in* DEUTSCHE RECHTS– UND SOZIALPHILOSOPHIE UM 1900 79–90 (Gerhard Sprenger ed., 1991).

> includes an economic constitution . . . Expressed in terms of state and society, the EEC takes as its starting point the law of bourgeois society and its institutions as the first manifestation of the universal in the international realm.[13]

This all now has a price. The liberation from the Weberian *Nationalstaat* came about through the imposition of legal commitments and constraints on the political autonomy of sovereign states. Due to these constraints, it became possible "to conceptualise an economic policy that can be bound to legal and constitutional norms."[14] Not only are the contents of economic policy affected by these demands, but the competencies of legislation and its scope[15] and the details of free collective-bargaining and co-determination.

This touches upon a sensitive issue. Even if we assume that the Treaties of Rome have established a European economic constitution, they nonetheless remain silent concerning labor and social law. This is why a functional equivalent of the "social *Rechtsstaat,*" in the sense of Article 20(1) German Basic Law or of the "social market economy," as Alfred Müller-Armack programmatically developed it[16] could not establish itself at the European level. Fritz W. Scharpf considers the implications of this finding—the separation of the economic and social constitutions—to be a design-flaw that places Europe's social integration at long-term risk.[17] These statements are sociologically based, and meant in a socio-political way. A different question concerns explaining how this decision came about; another concerns whether such explanations are normatively instructive and what legally binding effect may be granted to this initial situation. People widely view the reduction of the European social and labor constitution to the EEC Treaty's principle of non-discrimination as a successful negotiation on the part of Germany, supposed to have been worth attaining at the expense of agricultural policy. Now, the parties agreed upon the

[13] Mestmäcker, *supra* note 5, at 108–09.

[14] Mestmäcker, *supra* note 5, at 102.

[15] Mestmäcker, *supra* note 5, at 103.

[16] *See* ALFRED MÜLLER-ARMACK, WIRTSCHAFTSORDNUNG UND WIRTSCHAFTSPOLITIK. STUDIEN UND KONZEPTE ZUR SOZIALEN MARKTWIRTSCHAFT UND ZUR EUROPÄISCHEN INTEGRATION (1966); ALFRED MÜLLER-ARMACK, GENEALOGIE DER SOZIALEN MARKTWIRTSCHAFT. FRÜHSCHRIFTEN UND WEITERFÜHRENDE KONZEPTE (1974).

[17] Fritz W. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy,"* 8 SOCIO-ECON. REV. 211–250 (2010) (including references to earlier works); *see* Florian Rödl, *Die Idee demokratischer und sozialer Union im Verfassungsrecht der EU* [The Idea of a Democratic and Social Union in the Constitutional Law of the EU], *in* WOHLFAHRTSSTAATLICHKEIT UND SOZIALE DEMOKRATIE IN DER EU [Welfarism and Social Democracy in the EU] 1 EUROPARECHT 179–204 (Jürgen Bast & Florian Rödl eds., 2013).

quid pro quo under the influence of the welfare promises of the Ohlin Report,[18] impressing the political left at the time and taking place in the era of "embedded liberalism,"[19] in which the opening up of national economies seemed compatible with the establishment of welfare-state systems.[20]

What does all this mean in legal terms? Is this an irreversible "decision" about the alternatives of a planned economy versus a market economy? Or is this a constitutional compromise, similarly to how Hermann Heller found the Weimar Constitution to be a compromise; permanently binding guidelines for developing the relationship between the economic and labor constitutions in Europe?[21] Both positions suffer from the same difficulty. They treat the results of political negotiations as though they were the results of an assembly convened to draw up a constitution. So, is this merely a piece of history, whose further course is to be accepted as a kind of normative fact that we no longer can influence retroactively? This sequence of question marks indicates that there is no conclusive answer available. The constitutional configuration of the integration project is in permanent flux. Consolidated constitutional democracies too have to adapt to changing contextual conditions. But they tend to be more disciplined in the processes of adaptation.[22] In the EU Treaty, changes have become so burdensome that they are no longer conceivable. This is why the European praxis resorts ever-more evasive techniques and informal transformations of its order.

To put this slightly differently: European integration as a project without a defined *finalité*; it is adjusting to the dynamics of a development whose decoding is impossible without extra-legal means. We encounter such undertakings everywhere. Undoubtedly, the resort to Karl Polanyi—which now follows—is so far unusual. We submit that this is a promising encounter.

---

[18] Int'l Lab. Org., *Social Aspects of European Economic Co-operation: Report by a Group of Experts*, 74 INT'L LAB. REV. 99–123 (1956).

[19] John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 375, 392 (1982).

[20] *See* Claire M. O'Brien, *The UN Special Representative on Business and Human Rights: Re-embedding or dis-embedding transnational markets?*, *in* KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 323–357 (Christian Joerges & Josef Falke eds., 2011) (discussing Ruggie's later view).

[21] Florian Rödl, *Labour Constitution*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 605–640 (Armin von Bogdandy & Jürgen Bast eds., 2010); STEFANO GIUBBONI, SOCIAL RIGHTS AND MARKET FREEDOMS IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 7–15 (2006).

[22] In principle, Hans Peter Ipsen's term "continuous re-configuration," (*Wandelverfassung*) means nothing else. S*ee* Hans Peter Ipsen, *Europäische Verfassung—Nationale Verfassung*, *in* EUROPARECHT 195, 201 (1987).

E. Symptoms of Europe's Crisis in the Light of Karl Polanyi's Economic Sociology

Karl Polanyi is one of the three Viennese *émigrés* who grappled with fascism towards the end of World War II. The other two are Friedrich August von Hayek[23] and Karl Popper.[24] Polanyi took up the issue in his brief monograph, first published in 1944.[25] His analysis is specific, "embedded" in a re-construction of the core instability of industrial capitalism. This analysis lays heavy emphasis on the role played within capitalist society by three "fictitious commodities:" Money, labor, and land. These three fictitious commodities denote "goods" (*Waren*) which nonetheless predate and transcend "the market," and whose subsequent "commodification" not only provokes crises both within and around capitalism, but also prove to be an impetus for counter-movements to the market.[26] In view of the chronic instability within the EMU, the steady erosion of national labor and social constitutions, and continuing conflicts in the area of energy policy, Polanyi's theses and conclusions have gained a remarkable degree of general topicality. The following analysis limits itself within this paradigm to the European "integration through law project," and to the question of what European law has experienced, is experiencing, and what it has precipitated. This is not a matter, for example, of a generalized condemnation of market processes, at least not for strong voices in the Polanyian tradition.[27] Polanyi's thesis that treating fictitious goods as marketable products cannot come about smoothly is anything but comforting: Marketization of labor, land and money, he warned, will trigger crises and counter-movements. In view of the present state of the European Union, the erosion of the labor and social constitution, and the looming conflicts about the future of atomic energy, Polanyi's diagnoses are astonishingly topical.[28]

In the present constellation of conflict inter-dependencies, we must remain sensitive towards pertinent problems in their specific contexts. Drawing a line from Polanyi's

---

[23] FRIEDRICH AUGUST VON HAYEK, THE ROAD TO SERFDOM (1944).

[24] KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1945).

[25] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2001). *See*, *e.g.*, Jens Beckert, *MPIfG Discussion Paper 07/6*: *The Social Order of Markets*, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2007); WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 154–156 (2009); Fred Block & Marget E. Somers, *Karl Polanyi and the Writing of The Great Transformation*, *in* THE POWER OF MARKET FUNDAMENTALISM: KARL POLANY'S CRITIQUE 73–97 (2014) (discussing Polanyi's topicality).

[26] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 69 (2001).

[27] See Alexander Ebner, *Transnational Markets and the Polanyi Problem*, *in* KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 19, 29 (Christian Joerges & Josef Falke eds., 2011).

[28] *See* Christian Joerges, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration*, 21 CONSTELLATIONS (forthcoming 2014). The growing interest in Polanyi and the renaissance of economic sociology is due to current events, but is nonetheless more robust. *See* references *supra* note 25.

fictitious commodities to atomic energy is a stretch and may go too far, but it is not absurd to regard atomic energy as a non-marketable good.[29] In any case, the insight that the economic success of this type of energy is due not to natural evolutionary processes, but to the establishment of markets by political fiat instead, is irrefutable. European law plays an unfortunate role here. The Euratom Treaty of 1957[30] was in a position to declare atomic energy the technology of the future *par excellence*, but did not Europeanize it, leaving the decision about its use to the nation-states.[31] The Treaty of Lisbon did not change this in any way,[32] with the consequence that a phasing-out of atomic energy in Europe can only take place if all the Member States were to implement it, a scenario that definitely is nowhere in sight.

The consequences of de-coupling the labor and economic constitutions from one another either remained unobserved for a long time or parties presented them as being rectifiable. The notion that a "European social model" would take the place of the diverse variants of the Western European welfare states stood as no more than a pale utopian dream. This became apparent after the enlargement towards the East. At that juncture, the socio-economic disparities became so pronounced that a continuation of integration was feasible only in the form of "negative integration by reducing the social protection provided by welfare states. This strategy was initiated by the European Commission in collaboration with actors representing relevant interests in both the old and new Member States. The *Viking, Laval*, and *Rüffert*[33] decisions are the most striking legal, partial-victories, which can be viewed together as a confirmation of the decision to treat an economic constitution as a "pure" market constitution and as the abandonment of the

[29] Polanyi states: "To allow the market mechanism to be the sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society . . . [N]o society could stand the effects of such a system of crude fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill." *See* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 73 (2001).

[30] Euratom Treaty, Consolidated Version of the Treaty Establishing the European Atomic Energy Community, Mar. 30, 2010, 2010 O.J. (C 84) 1 [hereinafter Euratom Treaty].

[31] The silence of the Euratom Treaty is deafening: The EAEC Treaty did not grant the Community the competence to "authorise the construction or operation of nuclear installations." *See* Comm'n v. Council, CJEU Case C–29/99, 2002 E.C.R. I–11281/11311, para. 89. *See* Christian Joerges, *The Timeliness of Direct Democracy in the EU* – and the contest over atomic energy in conflicts-law perspectives in INTERNATIONAL CONSTITUTIONAL LAW IN LEGAL EDUCATION: PROCEEDINGS OF THE ERASMUS INTENSIVE PROGRAMME NICLAS 2010–2012, 89-100 (Jürgen Busch et al. eds., 2014) (critizing this legal situation)..

[32] Consolidated Version of the Treaty on the Functioning of the European Union art. 194, Oct. 26, 2010, 2010 O.J. (C 326) 47 [hereinafter TFEU].

[33] Int'l Transp. Workers' Fed'n v. Viking Line ABP, CJEU Case C–438/05, 2007 E.C.R. I–10779; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, CJEU Case C–341/05, 2007 E.C.R. I–11767; Rüffert v. Land Niedersachsen, CJEU Case C–346/06, 2008 E.C.R. I–01989.

common European constitutional compromise. One must also keep in mind, although, what this means with regard to the acceptance of the project of integration. If Polanyi's diagnoses are correct, then we must anticipate counter-movements seeking to restore perspectives calling for social protection, and such signals are becoming ever more visible after Europe's transformation into an "austerity union."

F. The Crisis of Economic and Monetary Union and the European Rule of Law

These very brief remarks must suffice so that space remains for the financial crisis that overshadows everything now.[34]

I. Juridification of Monetary Union

The financial crisis concerned the EMU as it took shape in the 1992 Treaty of Maastricht. The EMU was doubtless a political project, albeit one strictly from the influence of daily politics and entrusted instead to the medium of law. It was not "*alternativlos*" (without alternative), as is claimed today. In the 1970s, the Werner-Davignon Plans had attempted to synthesize the economic and social constitutions.[35] During these years, a general departure from Keynesianism came about; Keynesianism had been legally anchored in Germany in the 1967 Stability Act (*Stabilitätsgesetz*),[36] realizing the "magical quadrant"—price stability, high employment, balance of payments, and appropriately increasing economic growth—a balancing act that seemed very precarious to many renowned German constitutionalists at the time because it had to be entrusted to the evaluation and discretionary decision-making of the political authorities. While German traditionalists worried about rule-guided *Ordnungspolitik*, in Great Britain, the post-war welfare-state *acquis* was revoked. Such a background constellation provided a strong political basis for a new European consensus that was expressed in the project of the single market and the turn to monetarist concepts. Paradigm shifts of this kind do not simply follow theoretical reason, nor should their effective rejection be regarded as evidence of the success of the prevailing paradigm without further ado.[37]

---

[34] Christian Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, *in* THE CHANGING ROLE OF LAW IN THE AGE OF SUPRA- AND TRANS-NATIONAL GOVERNANCE 125, 151–61 (Rainer Nickel & Andrea Greppi eds., 2014) (discussing this issue more extensively).

[35] HAGEN SCHULZ-FORBERG & BO STRÅTH, THE POLITICAL HISTORY OF EUROPEAN INTEGRATION: THE HYPOCRISY OF DEMOCRACY-THROUGH-MARKET 43 (2010).

[36] Christian Joerges, *The Idea of a Three-dimensional Conflicts Law as Constitutional Form*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW 413, 420 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011).

[37] *See* MAURICE GLASMAN, UNNECESSARY SUFFERING: MANAGING MARKET UTOPIA 96, 98 (1996); FRITZ W. SCHARPF, *Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy*, 2–24 (5 MPIfG Discussion Paper 11/11, 2011) (discussing this in the context of the 1970s); *see also* COLIN CROUCH, THE STRANGE NON-DEATH OF NEO-LIBERALISM 49–

In the case of Europe's economic-policy orientation, individuals can discern two stages of re-orientation. First, Commission President Jacques Delors obtained broad support for his project of a single market, perceived as an institutionalization of economic rationality: A commitment to principles designed to guide all political action.[38] The Monetary Union and the Stability Pact[39] were understood as complementary projects, as institutionalizing an independent central bank outside all political spaces and beyond the institutional structure of the Union designed to consummate the new architecture and fossilize a supranational economic constitution.

This understanding is deeply flawed. What the Treaty of Maastricht has established through the separation of Europeanised monetary policy from national fiscal and economic policy can best be characterised as a "diagonal conflict". This notion requires an explanatory remark:[40] Monetary policy has become an exclusive competence of the Union (Article 3(1) c TFEU). With this provision, the Union claims supremacy in the policy area conferred to it, a conferral which did not include economic and fiscal policies. However, the exercise of these policies by the Member States can have effects which destruct the operation of monetary policy as adminstered by the Ruropean Central Bank (ECB). As experienced so drastically after 1992, the potential and actual tensions between monetary policy and the national policies cannot be controlled. This tension is not a vertical conflict for which arguably the supremacy principle could provide a response. It is a "diagonal conflict" in the just-defined sense because both the Union and the Member States are certainly interested in the functioning of their economies, but the powers required to accomplish this objective are attributed to two distinct levels of governance with often irreconcilable policy preferences. The type of conflict resolution foreseen in Article 119 TFEU is "the adoption of an economic policy which is based on the close coordination of Member States' economic policies" as substantiated in Article 121 TFEU and has proved to unworkable;this deficiency cannot be cured under the provisions of the Treaty of Maastricht and the soft law of the Stability Pact.

---

124 (2011); Peter E. Hall, Commentary, *Brother, Can You Paradigm?*, 26 GOVERNANCE: AN INT'L J. OF POL'Y, ADMIN. &INSTITUTIONS 189 (2013) (evaluting this matter in the present).

[38] *See* M. Rainer Lepsius, *Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien*, *in* INSTITUTIONENWANDEL, LEVIATHAN SONDERHEFT 16/1996 57 (Gerhard Göhler ed., 1997); *see also* M. Rainer Lepsius, *The European Union as a Sovereignty Association of a Special Nature*, *in* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? 213–222 (Christian Joerges, Yves Mény & Joseph H.H. Weiler eds., 2000) (considering how this applies to Europe).

[39] Resolution of the European Council on the Stability and Growth Pact, 1997 O.J. (C 236); TFEU art. 126.

[40] *See* Christian Joerges, *Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws*, *in* DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION 311, 318 (Beate Kohler-Koch & Berthold Rittberger eds., 2007); *see also* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM IN GLOBALIZATION 158–163 (2012) (discussing this issue further).

The decision by the FCC on the Treaty of Maastricht literally had a decisive part in making this misfortune come about, when it declared replacing politics by legal rules to be a *sine qua non* for Germany's participation, both in terms of content and institutionally.[41] The remarkably complex reasoning of the Court's Second Senate first dealt with the plaintiff's argumentation that the European Union had, under the new provisions, such far-reaching competence that the nation-states were no longer in a position to discharge important tasks. This called the continuing existence of "democratic statehood" into question. This argumentation also referred to monetary policy. But the Court then responded by occupying the spaces for democratically shaping policy with law. In so doing, it embraced the—in this instance, compatible—Ordo-liberal and monetarist theorems, and gave them a legal form: Economic integration, the Court said, was an apolitical process that both could and was permitted to take shape autonomously and beyond the Member States. Monetary Union was constituted appropriately via a constitutional duty to guarantee price stability and regulations to counter excessive budget deficits. In this way, the objections to the democratic legitimacy of economic integration seemed to resolve themselves. In the public-law divisions of European legal studies in both Germany and in the larger quarters of European constitutionalism, scholars either did not even realize this, or they did not deem it worthy of mention.[42]

II. Processes of Erosion

In Mestmäcker's account, what is at stake is power struggle between the political and the economic, which in his view, its law which must enjoy the highest authority.[43] Yet, this authority proved unable to prevail. The situation is more dramatic today. But the rules agreed upon were flawed in substance, and if they had been enforced, this would have caused harm. In line with this widely shared view, the very short life of the new legal

[41] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92 & 2 BvR 2159/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (Oct. 12, 1993). *See* Christian Joerges, *States Without a Market: Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses* (NISER Working Paper, 1996), *available at* http://eiop.or.at/eiop/pdf/1997-020.pdf; Michelle Everson, *Beyond the Bundesverfassungsgericht: On the Necessary Cunning of Constitutional Law*, 4 EUR. L. J. 389 (1998).

[42] Instead, the Court was confronted with its talk of an "association of states," its announcement that it would refuse to follow *ultra vires* legal acts, but above all, the statement that its democratic rule presupposes that a "relatively homogeneous people" has the opportunity "to give legal expression to what unifies them—intellectually, socially, and politically." Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219 (1995); *see infra* text accompanying notes 44–50.

[43] *See* Ernst-Joachum Mestmäcker, *Europäische Prüfsteine der Herrschaft und des Rechts*, 58 ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 3, 3–5 (2007) (restating this position).

edifice did not give rise to much concern.[44] When Germany, France, and the Netherlands, as well as others, failed to respect the rules of the Stability Pact, the Commission's much-vaunted efforts to take action against them dwindled into nothing. Barry Eichengreen, a renowned US observer of European monetary policy since the negotiations on the Treaty of Maastricht,[45] commented frankly on the breach of the law: "How can one expect compliance with a threshold which has no sound conceptual basis?"[46] Occasionally, he used even stronger language[47] and was by no means alone in voicing such principled criticism.[48] The Monetary Union was poorly designed and the enforcement of its rules would not prevent the damage, but increased it.

Things were to become much worse during the current crisis. The Union experiences a state of emergency where the law is losing its integrity. The all-too-meager points of reference provided in Article 122(2) TFEU, amended under the simplified revision procedures of Article 48(6) which "shall not increase the competences conferred on the Union in the Treaties,"[49] must justify incalculable solidarity payments.[50] The European Central Bank is disregarding its statutes as they used to be read;[51] parliaments are convened to make fast-tracked decisions that cannot be meaningfully discussed; Greece and other members of the Union are being told that their sovereignty is now "limited." Changes of government take place under exceptional circumstances. Polanyi and his analyses of monetary policy are only rarely mentioned during all this. Yet, bear in mind his qualification of money as a fictitious commodity,[52] and of the risks of destroying the social

---

[44] *See* Christian Joerges, *What is Left of the European Economic Constitution: A Melancholic Eulogy*, 30 EUR. L. REV. 461, 465 (2005) (discussing this matter in greater detail).

[45] *See* Barry Eichengreen, *Should the Maastricht Treaty be Saved?*, 74 PRINCETON STUD. IN INT'L FIN. (1992).

[46] Barry Eichengreen, *Institutions for Fiscal Stability* (Working Paper PEIF No. 6, 2003).

[47] *See, e.g.*, Peter Bofinger, *Are There Alternatives to the Stability Pact? Three Experts Answer*, DIE ZEIT (Nov. 20, 2003), http://www.zeit.de/2003/49/Oekonom_I (contribution of Barry Eichengreen) ("The 3% cap is at best ridiculous and at worst perverse.").

[48] Giandomenico Majone, *Rethinking European Integration After the Debt Crisis* (UCL Working Paper No. 3, 2012), *available at* http://www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf.

[49] Council Decision 2011/199, 2011 O.J. (L 91) 1 (amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro).

[50] *See infra* Part D.III (evaluating the Constitutional Court's decision on Greece). The reasons provided in plaintiff Peter Gauweiler's constitutional complaint by Dietrich Murswiek are available online. UNI FREIBURG: INSTITUTE FOR PUBLIC LAW, http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/gutachten.

[51] Martin Seidel, *Der Euro—Schutzschild oder Falle?* (ZEI Working Paper No. B01, 2010).

[52] "Money . . . is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance." KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 72 (2001). *See* Sabine Frerichs, *From Credit to Crisis: Max Weber, Karl Polanyi, and the Other Side of the Coin*, 40 J. OF L. & SOC'Y 7–26 (2013).

conditions under which market societies can function.[53] Ordo-liberal and monetarist standards were Europeanized in the legal constitution of the Monetary Union, although it was not possible to Europeanize their societal conditions for functioning that had developed over time. Majone explains his opinion that the central bank is a "constitutional monstrosity" by reasoning that the bank is supposed to pursue its stated goal of price stability in a political vacuum, and it is unable to take the Union's socio-economic disparities into account while doing so.[54] As Scharpf adds, the institutionalized inabilities to do anything other than react to instability and imbalance with intensified austerity programs not only threatens the well-being of European citizens, but also endangers the social acceptance of the Union.[55]

III. Reactions

The pace at which crisis summits are being held—and the drafting of more and more new legislation and regulatory complements—is breathtaking.[56] It is both important and meritorious to record all this precisely,[57] so that we can become aware of the tensions between our inherited concepts and methodological tools, and the present European *praxis.* Here, though, we must limit ourselves to a few highlights.

In March and May 2010, the Commission developed the "Europe 2020 Strategy"[58] and the "European Semester,"[59] respectively. These were followed by the European Financial

[53] Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011). *See also* Wolfgang Streeck, *MPIfG Discussion Paper 11/15: The Crisis in Context Democratic Capitalism and Its Contradictions*, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2011), *available at* http://www.mpifg.de/pu/mpifg_dp/dp11-15.pdf.

[54] *See* Giandomenico Majone, *Europe as the Would-be World Power: The EU at Fifty*, FOREIGN AFFAIRS, Jan. 2010, http://www.foreignaffairs.com/articles/65854/giandomenico-majone/europe-as-the-would-be-world-power-the-eu-at-fifty.

[55] Fritz W. Scharpf, *MPIfG Discussion Paper 11/11: Monetary Union, Fiscal Crisis, and the Preemption of Democracy*, 5 MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2011).

[56] *See* Economic and Financial Affairs, COUNCIL OF THE EUR. UNION, http://www.consilium.europa.eu/press/press-releases/economic-and-financial-affairs?lang=en&BID=93 (updating information continuously).

[57] Suffice it here to refer to just a few examples from the torrent of literature. Christian Calliess, *Perspektiven des Euro zwischen Solidarität und Recht—Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 213 (2011); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 49 COMMON MKT. L. REV. 1777 (2011); PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM 457–517 (2013) (forthcoming, Chapter 12 on "Financial Crisis, Response, and Europe's Future"). *See also* Nicole Scicluna, EU Constitutionalism in the Twenty-first Century: Politics and Law in Crisis (2013) (unpublished Ph.D. thesis, La Trobe University) (analyzing Europe's present constitutional constellation, its *Vefassungswirklichkeit*, in Chapter 5).

[58] *Communication from the Commission*, COM (2010) 2020 final (Mar. 3, 2010).

[59] *Communication from the Commission*, COM (2010) 250 final (May 12, 2010).

Stability Facility (EFSF) Framework Agreement[60] in June 2010 and by the European Council's "Euro Plus Pact"[61] in March 2011. Simultaneously, upon the basis of the simplified revision procedures laid down in Article 48(6) TEU, the European Council also decided on 25 March 2011 to add a new Paragraph 3 to Article 136 TFEU, which permitted the establishment of a stability mechanism and the granting of financial assistance, effective 1 January 2013.[62] This was followed in November 2011 by a bundle of legislative measures aimed at re-enforcing budgetary discipline on the part of the Member States. The package is supposed to go down in history under the catchy title of the "Six Pack" and entered into force on 13 December 2011.[63] The high point of all this is the Treaty on Stability, Co-ordination and Governance (TSCG), drafted in December 2011, approved at an informal meeting of the European Council on 30 January 2012,[64] and signed on 2 March 2012 by twenty-five out of the then twenty-seven Member States. A debt brake according to the German model has been introduced, and will be subject to judicial review by the CJEU in the form of institutional borrowing, with one Member State bringing action against another. Support from the European Stability Mechanism (ESM)—a permanent crisis fund—will be available only to countries in the euro area that have signed the pact. The TSCG has been ratified by the required number of Member States and entered into force on 1 January 2013. Two further Regulations submitted back in November 2011—the "Two-Pack"—were adopted with parliamentary blessing in March 2013. They provide "for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area" and "the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area."[65]

There is much to scrutinize here: The legal problems, their treatment in legal scholarship, the analysis and interpretation of what has been established. The law-politics relationship is particularly challenging. Lawyers—practitioners and academics alike—have all

[60] The Framework Agreement was concluded by the ECOFIN Council and confirmed by the European Council, Brussels on June 17, 2010. Council Conclusion No. 2 of June 17, 2010, EUCO 13/10.

[61] Council Conclusion No. 3 of Mar. 25, 2011, Annex I, EUCO 10/11.

[62] Council Decision 2011/199, 2011 O.J. (L 91) 1 (amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro).

[63] Council Regulations 1173–1177/2011, 2011 O.J. (L 91) 1; Council Directive 2011/85, 2011 O.J. (L 91) 1.

[64] See the Communication of the euro area Member States as well as the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union in the version of Jan. 20, 2012, *available at*: http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf.

[65] *See* Press Release, European Parliament, Green light for economic governance "two pack" (Mar. 12, 2013), http://www.europarl.europa.eu/pdfs/news/expert/infopress/20130312IPR06439/20130312IPR06439 _en.pdf.

traditionally sought to remain on good terms with political power.[66] When it comes to Articles 122–126 TFEU, our discipline can apparently not resist helping political and institutional actors by taking the letter of the law so lightly as to run afoul of it. But just as legally wayward spirits will sometimes fail to finesse a fine legal point and must withdraw without achieving anything, jurisprudence is facing problems that seem to lie beyond the reach of its methodological means and conceptual potential. We are not going to re-construct these discussions in any detail here, but merely underline three particularly disturbing constitutional issues which will be discussed in the following Sections 1–3. These are:

(1) The establishment of new regimes of economic governance outside the institutional frameworks of the Treaties and of national constitutions, for which two German lawyers[67] have coined the notion of *völkerrechtliches Ersatzunionsrecht*; the main difficulty here is that *Ersatzunionsrecht* legalizes departures from the European Treaties without their amendment.
(2) The problem of whether the means by which these regimes have been established may be used to intervene into national constitutions and imposed upon democratically-legitimated governments which require financial support; with this practice, Europe's crisis management is following international examples.[68] The German Constitutional Court was confronted with the query of whether such practices can be employed among the Member States of the Union and/or are even required by Germany's constitution; the main difficulty here is that unelected authorities exercise controls to which the democratic bodies of the state under supervision agree under enormous eternal pressures.
(3) A third issue is often obscured as a simple matter of methodological interpretation. The difficulty here is that the conceptual basis for EMU is disregarded and replaced a new type of economic governance. If the EMU suffers from a design defect and the implementation of the law as it stands seems to

[66] *See* Michael Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence After 1933 and Post-1945*, *in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 1–18 (Christian Joerges & Navraj S. Ghaleigh eds., 2003) (Stolleis' observations concern primarily, but by no means exclusively, Germany's Nazi period).

[67] R. Alexander Lorz & Heiko Sauer, *Ersatzunionsrecht und Grundgesetz – Verfassungsrechtliche Zustimmungsgrundlagen für den Fiskalpakt, den ESM-Vertrag und die Änderung des AEUV*, *in* 65 DIE ÖFFENTLICHE VERWALTUNG 573–612 (2012), cited in the judgment of the German Constitutional Court of Sept. 12, 2012, *infra* note 89, at para. 257 of the German version, and para. 226 of the English version.

[68] Pertinent practices have been exercised by central banks and the IMF long before the financial crisis. They have been characterised as a feature of the global capital market: "The new conditionality of the global economic system—the requirements that need to be met for a country to become integrated into the global capital market — . . . facilitates the task of instituting a certain kind of monetary policy." Saskia Sassen, *De-Nationalized State Agendas and Privatized Norm-Making*, *in* PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 51, 56 (Karl-Heinz Ladeur ed., 2004).

cause harm, can its rationale be replaced by some alternative, and who is empowered to decide upon such emergencies? The CJEU did not shy away from handing down clear answers to the queries in the *Pringle* case on 27 November 2012.[69]

1. Community Method v. Union Method and Ersatzunionsrecht

The special feature of the European system—as Joseph H.H. Weiler explained in his seminal 1981 essay—is the simultaneity and balance of supranational law and inter-governmental policy.[70] Weiler thus characterized a precarious relationship, but certainly did not seek to grant the Member State governments *carte blanche* to suspend their commitments to Community (now Union) law whenever they believed that doing so would be irrefutable and expedient. And precisely this is the historical achievement of the Treaties of Rome: That they endeavored to rein in the power-political actions of the Weberian nation-state by legal means. The differences between different modes of interaction in the Union have been quite thoroughly explored.[71] The move from arguing and deliberative problem-solving to bargaining and the strategic pursuit of "national" interests and the replacement of the old Community method in which the law provided institutional and procedural protection to the weaker actors make a real difference. Thanks to its domination by the Council, the new "Union method" faithfully mirrors the power asymmetries in the Union. Should the law care? Mark Dawson and Floris de Witte are among the few[72] who have raised this issue.[73]

---

[69] Pringle v. Ireland, CJEU Case C-370/12 (Nov. 27, 2012), http://curia.europa.eu/.

[70] Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. OF EUR. L. 257, 257 (1981).

[71] Christine Reh, *European Integration as Compromise: Recognition, Concessions and the Limits of Cooperation*, 47 GOV'T AND OPPOSITION 414–40 (2012).

[72] There are more, but they are rare. For another noteworthy exception with a great sensitivity for the hybrid nature of the Union *praxis*, see Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, *in* 50 COMMON MKT. L. REV. 683, 685, 690 (2013). Chiti and Tereiro, throughout their analyses, assess what they lucidly describe through functional and normative yardsticks and thereby soften their critique; their conclusion is nonetheless uncompromising on this point: The new hybrid method "tends to set aside the role of EU institutions in exercising their respective competences within a democratic framework based on EU law in favour of power-based intergovernmental relations." *Id.* at 708. But this is precisely the reason why not only democracy but also the rule of law in its core transnational function—as we have underlined it in Part B—is at stake.

[73] Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis,* 76 MOD. L. REV. 817-844 (2013) at 838 . They conclude that "the rise of executive control via the European Council, the increasing ease of making Treaty and legislative reforms without consulting smaller member states, and the creation of eternal fiscal rules uncontrollable by national parliaments, unable to be fully discussed and legitimated,is now in danger of desensitising the Union . . . ." *Id*.at 842. Indeed, and it is true "that the Union's existing response . . . does not bode well for the future." *Id.* at 844. What remains to be explained is Europe's apparent political inability to organize a legally robust response to these insights. *See* discussion infra.

It is simply amazing that it has become the rule among lawyers not to take these issues seriously. To be sure, the Member States of the Union have conferred their sovereignty only in "limited fields" and retain political autonomy where this does not occur. But they nonetheless remain bound by their common commitments, in particular to democracy and the rule of law (Article 2 TEU). This is why the sovereignty that they have retained does not empower them to enter into *qualsiasi* agreement. The Fiscal Compact requires from its signatories[74] changes of fundamental constitutional importance, and the modes of their implementations are anything but consensual.[75] The methodological reasons invoked in various modes replicate what could be observed earlier in European law, namely a resort to legal formalism which shields law from justifying to what extent it is used:[76] "Intergovernmental cooperation permits Member States to exercise reactive crisis management, but Union law does not provide an instrument for doing so."[77] "Major

[74] Least from Germany, which has in 2009 constitutionalized the *Schuldenbremse* in Article 109 Basic Law. Constitutional provisions, however, are easier to amend than multilateral treaties.

[75] Suffice it here to point to the analysis submitted by political scientist Martin Höpner and lawyer Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, *in* ZBW – LEIBNIZ-INFORMATIONSZENTRUM WIRTSCHAFT 219–21 (2012); similarly Jürgen Bast & Florian Rödl, *Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung*, *in* 39 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 269–78 (2012). The authors demonstrate in detail that the Council's power of surveillance in accordance with Article 136(1) (b) does not provide for the sanctions which the new regime establishes. Although the coordinating competencies in accordance with Article 121 TFEU (3) and (4) provide for reporting requirements on the part of the Member States as well as recommendations by the Commission, Article 121(6) TFEU does not permit mandatory sanctions. Indeed, the multilateral surveillance in accordance with Article 121(3) and (4) TFEU contains provisions for reports, recommendations, and warnings, but no security deposits (whether or not they bear interest) or fines. Article 121(6) is aimed at removing the right to regulate the details of the procedures in accordance with Article 121(3) and (4) TFEU. The assumption that the Council could reject recommendations from the Commission concerning surveillance only with a qualified majority—but also that such a shift in the institutional structure would be up for negotiation by the Member States—is untenable. This arrangement has created a hybrid of justice and injustice by establishing a regulatory machinery which is not provided for in the Union's legal framework and is to be superimposed on the Member States' institutions and political procedures. *See also* ANDREAS FISCHER-LESCANO, THE EUROPEAN TSCG AND EU LAW (2012), http://www.eunews.it/wp-content/uploads/2012/09/2012_09_06_Fischer-Lescano_Gutachten-kurz_Fiskalpakt_060912-EN.pdf, *and* Lukas Oberndorfer, *Der Fiskalpakt—Umgehung der 'europäischen Verfassung' und Durchbrechung demokratischer Verfahren?*, *in* JURIDIKUM 168–81 (2012).

[76] *See* Christian Joerges, *A New Alliance of De-Legalisation and Legal Formalism? Reflections on the Response to the Social Deficit of the European Integration Project*, *in* DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT SONDERBAND 18, 437–50 (Hauke Brunkhorst ed., 2009).

[77] Daniel Thym, *Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle*, *in* 25 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 167–71 (2011); Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, *in* 66 JURISTENZEITUNG 2011–15 (2011). As a student of the "Darker Legacies of Law in Europe," I cannot refrain from a plea for linguistic sensitivity. It is one thing for Joseph H.H. Weiler to introduce "total law" as a trademark, or for Loïc Azoulai to write about "total harmonisation"; Germans must not disregard the connotations of such terms. The same holds true for the establishment of secondary legal regimes. Germans are as free as anybody else to approve such developments, but they should make it clear that they are aware of the shadow of Ernst Fränkel's *Doppelstaat* and Franz Neumann's *Behemoth*.

sections of the Euro rescue package" were "designed as intergovernmental macro-financial assistance" and "should therefore [sic] not be measured against European-law standards."[78] This move has its methodological precursors in the widely-acclaimed resort to the Open Method of Co-ordination (OMC) in the field of social policy. Its liberation from the straitjacket of the "Union method" and the replacement of hard law by soft law was explicitly targeted at the attainment of social objectives which were unattainable under the old regime.[79] The present case, although, is much more dramatic. While the OMC did not accomplish the noble objectives that its proponents had envisaged, the resort to the "Union method" amounts to a deep transformation of the European constitutional constellation. The stakes are not only higher for this reason, but also because the organizers of the new modes of economic governance fail to provide any theoretical framework within which the means that would be employed to bring the deeply affected Member States "back on track" become visible and comprehensible.[80] It is far from clear

[78] Daniel Thym, *Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle*, 25 *Europäische Zeitschrift für Wirtschaftsrecht* 167–71 (2011); Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, 66 JURISTENZEITUNG 1011, 1014 (Christian Joerges trans., 2011). This is, by now, the dominant position in European constitutionalism. This is a recent *acquis*, however. As late as 2011—and hence in the middle of the crisis—De Witte considered that the German constitutional court might declare the EFSF to be incompatible with German constitutional law and an *ultra vires* act in contravention of the "no-bailout" provision of Article 125 TFEU. Bruno de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, *in* EUR. POL'Y ANALYSIS 1, 6 (2011). This was, indeed, a widely-shared concern; *see, e.g.*, Nikolas Busse, *Unter Aufsicht. Nicht nur im Fall Griechenland: Die Deutsche Europapolitik wartet auf Karlsruhe*, FRANKFUTER ALLGEMEINE ZEITUNG (2010). Bruno de Witte has clarified his position on various occasions, particularly succinctly in Loïc Azoulai et al., *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, *in* EUI Working Papers Law No. 09, 6–8 (Anna Kocharov ed., 2012). His argument is far more sophisticated than the one cited in the text. But is not possible to come to terms with the TSCG simply because that Treaty states in Article 2 No. 2: "This Treaty shall apply in full to the Contracting Parties whose currency is the euro. It shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14." In the draft circulated until 2 March 2012, one could read: "This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union." What happened to the compatibility with the Union's primary law, one wonders. We must reckon with conflicts between the law of the Union as enshrined in the Treaties on the one hand, and the Fiscal Compact and the regulatory machinery established in response to the crisis on the other. The Fiscal Compact in its latest version simply assumes that, in such conflicts, it will prevail.

[79] *See* David M. & Luise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L. J. 343–64 (2005), and the critique in Christian Joerges, *Integration Through De-Legalisation?*, 33 EUR. L. REV. 219–312 (2008).

[80] By contrast, the proponents of the OMC relied on the well premises of deliberative polyarchy and/or democratic experimentalism: "In deliberative polyarchy, problem-solving depends not on harmony and spontaneous co-ordination, but on the permanent disequilibrium of incentives and interests imperfectly aligned, and on the disciplined, collaborative exploration of the resulting differences." Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, *in* PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 157, 168 (Karl-Heinz Ladeur ed., 2004). This is a formula which is very close to many methodological pronouncements within the conflicts-law approach and its plea for a proceduralisation. *See supra* notes 31, 33. The proponents of the latter approach diagnose, sadly, that conflicts-law constitutionalism has become a critic which can no longer be presented as a re-constructive approach. *See* Christian Joerges & Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative*?, *in* CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM FOR

how the new regime might accomplish what its organizers envisage and promise. Furthermore, the asymmetry between fully-harmonized monetary policy and nation-state competence in economic and fiscal policy diagnosed above remains unaffected. Above all, the stark socio-economic disparities—which have deepened since the Eastern enlargement—remain in place, as do the conflicts resulting from these disparities. As just underlined above, Europe's crisis management operates without conceptual guidance. And this is anything but fortuitous, as this crisis management is intergovernmental and must hence follow the logic of finding compromises between actors with different interests, institutional preferences, and political perspectives.[81]

2. Constitutional Guardianship I: Mutual Non-recognition of the Budgetary Power of National Parliaments?[82]

The German Federal Constitutional Court is by no means the only forum in which Europe's constitution has been tested.[83] Yet nowhere else does this occur with such regularity, and although the court has, indeed, gained the reputation of a dog "that barks but does not bite,"[84] the anxieties of the many publics in both the EU and elsewhere awaiting its decisions on the management of the financial crisis are easy to explain: This court supervises the economically most powerful Member State whose government underlines again and again how seriously it takes every judicial pronouncement. The FCC is, of course, well aware of all this. The mere fact that it is exposed to political scrutiny from many

---

DAVID M TRUBEK (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013). The most prominent proponents of OMC and democratic experimentalism see, apparently, no reason for such modesty and re-design. *See* Charles F. Sabel & Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, *in* 6 REGULATION & GOVERNANCE 410–426 (2012).

[81] For a deepened analysis, see Giandomenico Majone, *Rethinking European Integration After the Debt Crisis*, UCL WORKING PAPER NO. 3, at 19 (2012), *available at* http://www.ucl.ac.uk/european-institute/highlights/majone; Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, MPIFG DISCUSSION PAPER 11/11, Cologne 2011; Fritz W. Scharpf, *Legitimacy Intermediation in the Multilevel European Polity and its Collapse in the Euro Crisis*, MPIFG DISCUSSION PAPER 12/6, Cologne 2012. What both authors implicitly confirm is the validity of Polanyi's insights in the social embeddedness of the economy. *See supra* notes 25–28.

[82] The following passages on the crisis jurisprudence of the GCC and the CJEU draw on Michelle Everson & Christian Joerges, *Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?*, *in* POLITICAL REPRESENTATION IN THE EUROPEAN UNION: STILL DEMOCRATIC IN TIMES OF CRISIS? 400–28 (Sandra Kröger ed., 2014).

[83] *See* Darinka Piqani, SUPREMACY OF EU LAW AND THE JURISPRUDENCE OF CONSTITUTIONAL RESERVATIONS IN CENTRAL EASTERN EUROPE AND THE WESTERN BALKANS: TOWARDS A 'HOLISTIC' CONSTITUTIONALISM (June 11, 2010) (Ph.D thesis, EUI Florence), *and* Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, BERKELEY J. INT'L L. (forthcoming 2014).

[84] Joseph H.H. Weiler, *The 'Lisbon Urteil' and the Fast Food Culture*, 20 EUR. J. INT'L L. 505, 505 (2009), commenting on Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [*hereinafter Judgment of June 30, 2009*].

quarters and that its pronouncements are assessed politically means that it is *de facto* performing a political role. But the source of the court's authority is its legal mandate and the quality of its exercise. It is not just the outcome of a litigation that matters. In this respect Joseph Weiler hit the nail on the head with his respectful ridicule. Indeed, how realistic was it to expect that the Court would help Mr. Brunner and his *DM-Partei* overturn the Treaty of Maastricht in 1993?[85] Would Karlsruhe have been in a position to put a sad end to the Treaty of Lisbon, which had been negotiated with so much effort by so many actors over so many years?[86] And yet, these judgments did matter. In particular, the significance of the Treaty of Maastricht decision, which had for the first time raised the previously rather staid discussion about Europe to the level of a true constitutional debate, and which had—albeit only indirectly—imposed Germany's economic philosophy upon the rest of Europe,[87] can hardly be overstated.

Hardly anybody had serious doubts as to the outcome of the proceedings on the rescue package for Greece,[88] and on the ESM Treaty and the Fiscal Compact.[89] What observers were nevertheless anxious to learn was how the FCC would perform the balancing between law and politics, and thereby define its own constitutional guardianship.

2.1 The Rescue Package for Greece

The plaintiffs in this litigation were the usual suspects: A group of professorial economists and Dr. Gauweiler, a member of the *Bundestag*, as representing the Bavarian branch of the Christian Democratic party (CSU). They challenged both German and European legal instruments as well as further measures related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union.[90]

---

[85] *See infra* Part D.I.

[86] *Judgment of June 30, 2009.*

[87] *See infra* Part D.I.

[88] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (Sept. 7, 2011), http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html [hereinafter *Judgment of Sept. 7, 2011].*

[89] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1390/12 (Sept. 12, 2012), http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html [English translation], http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html [German] [hereinafter *Judgment of Sept. 12, 2012*].

[90] Namely, the *Währungsunion-Finanzstabilisierungsgesetz,* (Monetary Union Financial Stabilisation Act), which grants the authorization to provide aid to Greece, and the *Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*, (Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism).

My reading of the judgment on the Greek rescue package focuses on three concerns. The first is the tension between the financial crisis management and the German constitution. In this regard, the message of the Court is strong in principle, but not so constraining in practice: Budgetary powers are a core responsibility of the parliament and a central element of democratic self-rule.[91] This is why the *Bundestag* must remain "the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments."[92] But this is where the law's prerogatives end; parliament enjoys wide latitude in the exercise of its responsibilities, a political prerogative which the Court will respect.[93] A second concern is the compliance with the order of competences. The Court recalls its famous dictum from the Maastricht Judgment: Legal instruments that disregard the order of competences (*ausbrechende Rechtsakte*) do not apply in Germany.[94] But this *monitum* is actually soft, because it needs to be read in the light of the *Mangold/Honeywell* decision.[95] The court refrained, though, from considering the request for a preliminary ruling under Article 267 TFEU with a view to having the CJEU examine the compatibility of the rescue measure/s with Article 125 TFEU. Instead, it contented itself with assuring that Monetary Union was designed to be a "stability community" and hence is one.[96] And we, the citizens? We cannot, in a constitutional democracy, be obliged to comply with European commands that exceed the competences conferred to the Union. Hence, we need to accept that our government takes its commitments to our financial interests seriously.[97] "A crafty and blandishing wink of the eye," comments Ruffert.[98] In fact, the Court is examining only whether Germany has met its "integration responsibility" (*Integrationsverantwortung*), and then leaves the question unanswered of "under what conditions constitutional complaints against non-treaty changes of primary Union law can be based upon Article 38 Paragraph 1 Sentence 1

[91] *Judgment of Sept. 7, 2011* at paras. 121–23.

[92] *Id.* at para. 124.

[93] *Id.* at paras. 130–32.

[94] *Id.* at para. 116 (referencing the decisions on *Maastricht* [BVerfGE 89, 155, 175] and *Honeywell* [BVerfGE 126, 286, 302 *et seq*.]); in the Maastricht decision, *see also* paras. 129 & 137 on commitment to the stability concept.

[95] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06 (July 6, 2010), https://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html.

[96] *Judgment of Sept. 7, 2011* at para. 129. The court adds: "In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (Articles 123 to 126, Article 136 TFEU)." *Id.* This remark attracted considerable attention but has not been taken too seriously by the ECB.

[97] *Id.* at para. 98.

[98] Mattias Ruffert, *Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011*, EUROPARECHT 842, 844 (2011).

German Basic Law."[99] The intergovernmental decisions were not "sovereign acts of German public authorities," "notwithstanding other possibilities for legal review," which is why they could not be challenged.[100]

Is it adequate to consider the decision's "lasting merit" to be the fact that it "honestly recognized the limits of its own substantive expertise?"[101] Wise judicial self-restraint is hardly a proper reading of this rescue package judgment—certainly not if it is read in conjunction with the follow-up judgment of 12 September 2012.

2.2 The ESM Treaty and the Fiscal Compact

This litigation was more spectacular by far. Not only the usual plaintiffs but also the parliamentary group of *Die Linke* and no less than 37,000 citizens—among them very prominent figures—had filed constitutional complaints with which they primarily requested a temporary injunction, which would inhibit the entering into force of the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt until the decision of the FCC in the principal proceedings.

The outcome was as usual. The government, Brussels, and the market were relieved. The resonance in academic quarters was unusually positive. On closer inspection, though, the judgment turns out to be highly problematical. Its ambivalence stems, unfortunately, from the Court's renewed defense of the budgetary power of the German *Bundestag* as a democratic essential. As in the previous judgment, one wonders about the *de facto* importance of this principle. Again, the Court underlined that the *Bundestag* enjoyed wide latitude which the judiciary had to respect.[102] Through this move, the rights of the *Bundestag* were re-defined in a proceduralizing mode: The Parliament must be adequately informed, enabled to deliberate, and prevented from delegating its evaluation. It is far from clear, though, to what degree these *caveats* will enable the German Parliament to exercise effective supervision of its government and its transnational activities.[103] Even more important and questionable is the Court's complacency with the rest of the Union. In the pertinent passages, the Court once again strengthened the link between the *Bundestag*'s budgetary responsibility and a distinctly German philosophy of stability (e.g., price stability and the independence of the ECB above all).[104] As a consequence, the nature

[99] *Judgment of Sept. 7, 2011* at para. 109.

[100] *Id.* at para. 116.

[101] *See* Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, 66 JURISTENZEITUNG 1015 (2011).

[102] *Judgment of Sept. 12, 2012* at para. 180.

[103] *See* Christian Geyer, *Anatomie einer Hintergehung* [Anatomy of a Deceit], FRANKFURTER ALLGEMEINE ZEITUNG, June 21, 2012, at 29.

[104] The German version reads:

of the EMU as a stability community (*Stabilitätsgemeinschaft*) is even seen as being protected by the "eternity clause" of Article 79(3) of the German Basic Law as an unamendable core of Germany's constitutional identity. Thus, the stability principles become the core of a refurbished European economic constitution.[105] All this—the Court hopes—will protect the democratic rights of German citizens. Non-German citizens of the Union, however, should not be amused at all. Why is budgetary autonomy not understood as a "common" European constitutional legacy, respect for which is demanded by Article 4(2) TEU?

The one-sidedness of this argument is all the more disappointing as the Court, in an earlier paragraph of its judgment, had opened another and more constructive perspective: The Court explained that "Article 79(3) seeks to protect those structures and procedures which

---

> *Die haushaltspolitische Gesamtverantwortung des Deutschen Bundestags wird in Ansehung der Übertragung der Währungshoheit auf das Europäische System der Zentralbanken namentlich durch die Unterwerfung der Europäischen Zentralbank under die strengen Kriterien des Vertrages über die Arbeitsweise der Europäischen Union und der Satzung des Europäischen Systems der Zentralbanken hinsichtlich der Unabhängigkeit der Zentralbank und die Priorität der Geldwertstabilität gesichert. Ein wesentliches Element zur unionsrechtlichen Absicherung der verfassungsrechtlichen Anforderungen aus Art. 20 Abs. 1 und Abs. 2 in Verbindung mit Art. 79 Abs. 3 GG ist insoweit das Verbtot monetärer Haushaltsfinanzierung durch die Europäische Zentralbank.*

Judgment of Sept. 12, 2012 at para. 116. Paragraph 220 in the English translation reads:

> In view of the transfer of monetary sovereignty to the European System of Central Banks, the German *Bundestag*'s overall budgetary responsibility is safeguarded particularly by the fact that the European Central Bank subjects itself to the strict criteria of the Treaty on the Functioning of the European Union and of the Statute of the European System of Central Banks with regard to the independence of the Central Bank and to the priority of monetary stability (see *BVerfGE* 89, 155 <204-205, 207 *et seq*.>; 129, 124 <181-182>). In this context, an essential element of safeguarding the constitutional requirements resulting from Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law in European Union Law is the prohibition of monetary financing by the European Central Bank (see BVerfGE 89, 155 <204-205>; 129, 124 <181-182>).

Id. at para 220. Paragraph 170 is not yet translated. The German original reads: "*Da der Bundestag durch seine Zustimmung zu Stabilitätshilfen den verfassungsrechtlich gebotenen Einfluss ausüben und Höhe, Konditionalität und Dauer der Stabilitätshilfen zugunsten hilfesuchender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV*." *Id.* at para. 170.

[105] *See id.* paras. 219–20, 232–33, 239–79, 300–19.

keep the democratic process open."[106] The Court did not indicate that it would be prepared to address the tensions between democratic commitments and the integration process, which would include the concerns of all the Member States. Instead, the Court's reasoning leads to a strengthening of the links between economic stability and social austerity. This form of judicial self-restraint seems even more questionable in the light of—or rather, in the shadow of—the Maastricht Judgment discussed above.[107] Once again, the FCC imposes German views on the rest of Europe, albeit in a significantly modified move. While the *Maastricht* judgment assumed that Europe's economic constitution could be an essentially legal project, the new judgment is moving from law to governmental and executive managerialism, with requirements defined mainly by Germany and its Northern allies. To put it slightly differently, we find it deplorable that the FCC acted as (only) the guardian of the German constitution. The qualification of financial assistance as a matter not of European monetary but of national economic policy,[108] as well as the somewhat euphemistic statements on the respect of the stability commitments,[109] are anything but robust indicators of truly European commitments. They are embedded in the conditionality of existing crisis management. The FCC talks about democratic essentials—Jürgen Habermas has observed—but has Germany in mind.[110] The one-sidedness of its decision seems, indeed, obvious—and difficult to overcome. The German Court is not entitled to act as the Guardian of Europe. What we would expect, although, is a readiness to define Germany as a Member of a Union in which the concerns of all the Member States and their democratic rights deserve recognition. Only then would the Court document an understanding, or *Integrationsverantwortung*, which might reflect common European commitments.[111]

3. Constitutional Guardianship II: The Methodological Failures of the CJEU in the Pringle Case

Thomas Pringle, Member of the Irish Parliament, raised a series of objections against the involvement of his government in the ESM Treaty. Of particular interest in the present context is his assertion that the ESM constitutes an autonomous and permanent international institution, designed to evade restrictive provisions in the TFEU in relation to

---

[106] *Id.* at para. 206 in the English extract, para. 222 in the German original.

[107] *See supra* Part F.I.

[108] *Judgment of Sept. 12, 2012* at para 169 [English version].

[109] *Id.* at paras. 201.

[110] JÜRGEN HABERMAS, DREI GRÜNDE FÜR 'MEHR EUROPA' [Three Reasons for "More Europe"] (2012), *reprinted in* JÜRGEN HABERMAS, IM SOG DER TECHNOKRATIE 132–37 (2013).

[111] For a similar critique, see Henning Deters, *National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court*, 20 EUR. L. J. 204–20 (2014).

economic and monetary policy, and amounts to a usurpation of competences which were not conferred to the Union. This argument concerns the transformation of the European economic constitution through *Ersatzunionsrecht* which we have discussed in section III above. It is intrinsically linked to Pringle's concern with the rule of law. He argued the new regime has suspended the principle of legal protection. His complaint was rejected in the first instance, but, on appeal, the Irish Supreme Court, in a judgment of 17 July 2012,[112] decided to stay proceeding and submit a reference for a preliminary ruling to the CJEU. The CJEU (Full Court) handed down its judgment on 27 November 2012.[113]

The argument upon which the following analysis focuses is based upon the Court's reading of the bailout prohibition of Article 125 TFEU, and the emergency exception in Article 122(2) TFEU, through which the unrestrained new mode of economic governance is justified; these are key provisions of the economic constitution established under the Treaty of Maastricht and their re-vision through the judiciary is, hence, about the structuring of a new constitutional constellation. The reasons for this transformation have been addressed throughout the previous sections. It has, by now, become a *communis opinio* that European monetary policy—with its pre-defined objectives and institutional frameworks—cannot operate in tandem with the multitude of national actors that are pursuing economic and fiscal policies under a very loosely-constructed machinery of European supervision. The message of the *Pringle* judgment is in line with that which we have observed thus far; the failures of the past justify the efforts of Europe's crisis management which can, therefore, be legalized. The Court's attitude is certainly understandable; its reasoning, however, suffers from serious flaws.

The main flaw is the Court's failure to address the implications of its own explanation of the conceptual background to the "no-bailout" clause:

> The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes, at Union level, to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union.[114]

[112] *Pringle*, CJEU Case C-370/12.

[113] *Id.*

[114] *Id.* at para. 135.

This is, indeed, a fair re-statement of an ordo-liberal legacy that we can still identify within the Maastricht EMU. Except, the Court is then silent with regard to the philosophy underlying our current cure to the failures of the past. This is by no means to suggest that the Court should have advocated an ordo-liberal renaissance. Nonetheless, what truly disappoints in its presentation of the new modes of economic governance is the lack of any kind of conceptual deliberation about their background and their adequacy. As we have argued in Section III, the new modes of European economic governance amount to nothing less than a deep transformation of the state of the European Union. To put it slightly differently: Is the CJEU legitimated to depart from the law as it stands and to replace it with a new regime?

The Court finds an easy answer:

> Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who [sic] are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.[115]

This is, in itself, a daring assumption. But precisely if one subscribes to the "bicycle theory" of Europe, and concedes that the constant re-writing of its law is an irrefutable necessity,[116] that one must, all the more, insist both upon an explanation of the new objectives and deliberation on the adequacy of the means which they are employing.

Prior to the *Pringle* judgment, Kaarlo Tuori had developed a transformative theory, which sought to anchor the disregard of the economic philosophy underlying the EMU in a "second order *telos:*"[117]

> [A] teleological interpretation should heed not only the particular *telos* of the no-bailout clause but also the more general objective of the regulative whole Article 125(1) is part of. And this 'second-order' *telos* of the no-bailout clause undoubtedly includes the financial

[115] *Id.* at 116.

[116] *See supra* note 22*,* Part C with the reference to Hans Peter Ipsen.

[117] See, on the defence of the CJEU, Paul Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 MAASTRICHT J. OF COMP. & EUR. L. 3-11, 10 (2013). Craig characterises the Court's reasoning on Art. 15 as "tenuous" and then uses the two authors cited in the text to strengthen the judicial argumentation whereas I feel that they reveal its weaknesses further. *Id.* at 8.

> stability of the euro area as a whole. This argument supports the legal impeccability of Member-State assistance, in spite of the no-bailout clause and the inapplicability of the emergency provision in Article 122(2) TFEU. But it also justifies and even presupposes, at least to a certain extent, the 'strict conditionality' of assistance.[118]

Tuori's argument can be read as a search for rationality, an effort to shield the law, its production, and its application against its replacement by pure politics. His argument was not available to the Court, and the *Pringle* judgment was obviously not available when Tuori developed it. It is all the more illuminating that the core of his *telos* theory is present in the judgment; in the paragraph already cited, the court invokes "the logic of the market" as the rationale of the new regime, and underlines that it is precisely this logic which requires strict conditionality.[119]

In an essay seeking to understand and explain what makes resorting to *topoi* and theorems from economics so attractive for legal scholarship, jurisprudence, and the judiciary in transnational constellations in which the modes of legitimation as we know them from constitutional democracies are not available, Michelle Everson has deciphered the "processes by which law has transformed itself into an economic technology."[120] The *Pringle* judgment provides a stunning illustration of her analysis. There is no sinister conspiracy at work in the argumentation of the court and its supporters, but a serious and desperate effort to defend the law's *proprium*. The tragedy of all these moves remains that "the logic of the market" fails to deliver the kind of objective orientation which the lawyers hope for. The clearest and, at the same time, most disquieting confirmation of that dilemma can be read in Advocate General Kokott's view:

> Given the mutual interdependence of the Member States' individual economic activities which is encouraged and intended under European Union law, substantial damage *could be* caused by the bankruptcy of one Member State to other Member States also. That damage *might possibly be* so extensive that an

---

[118] Kaarlo Heikki Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, *in* EUI WORKING PAPER LAW 2012/28, 34 (Nov. 1, 2012).

[119] "[T]he activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions," Pringle v. Ireland, CJEU Case C-370/12, 2012 E.C.R. I-000, para. 135.

[120] Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, 24 L. & CRITIQUE 107 (2013).

> additional consequence would be to endanger the survival of monetary union, as submitted by a number of parties to the proceedings.
>
> There is no question here of finding that such a danger to the stability of the monetary union exists or *of examining how such a danger should best be combated.* It must only be emphasized that a broad interpretation of Article 125 TFEU would, also in such circumstances, deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves. In my opinion, such an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection cannot be founded on a broad teleological interpretation of a legal provision the wording of which does not unambiguously state that restriction.[121]

The rescue measures are political decisions; they need no legal justification: *auctoritas, non veritas, facit legem*. The replacement of law by discretionary political fiat is Schmittianism pure. It is, therefore, unsurprising that the deeply undemocratic nature of conditionality goes unnoticed or fails to be commented upon.

3.1 An Interim Conclusion

What would have happened to the European Union had its Court of Justice found: That Thomas Pringle's concerns about Europe's crisis management were well-founded; that the support mechanisms which the EFSF and the ESM have established interfere with the exclusive European competence for monetary policy; that the amendment of Article 136 TFEU was not possible under the simplified revision procedure enshrined in Article 48(6) TEU; that new policies being adopted and pursued by the Member States jeopardized the primacy of price stability; that the bail-out provision of Article 125 TFEU prohibited the granting of financial assistance to Member States whose currency is the Euro; that the functions assumed by the Commission, the ECB, and the IWF were irreconcilable with the principles on the conferral of powers laid down in Article 13 TFEU; or that the mandate allocated to the CJEU in the ESM Treaty exceeded judicial powers? It is simply impossible to predict the dire consequences.

[121] View of Advocate General Kokott at paras. 139-140; *Pringle*, CJEU Case C-370/12.

It is equally difficult to determine what the judgment has accomplished, both in terms of its contribution to the taming of the crisis, *and* its effect on Europe's constitutional constellation and the role of law. The situation of the FCC is not much different. The Court could not clarify the factual uncertainties of the financial crisis, and no normative guidance was available to help the Court assess the risks of partisanship for or against the European praxis. The German court decided to (re-)delegate responsibility for present and future consequences to the political process. The European court elected to prioritize textual formalism over conceptual reasoning—as though Ernst Steindorff never wrote about the politics of law,[122] and without justifying its departure from the type of teleological interpretation on which it tends to rely so heavily.[123] These are but methodological shortcomings. The substantive theoretical default of both courts is their disregard for Europe's commitments to democracy and the rule of law. This unfortunate complacency is inherent in the politics of conditionality to which both courts subscribe. [124] To rephrase this critique: Do these courts and the academics supporting them "place a thin veneer of legality on the political which allows the executive to do what it wants?"[125] Do they consciously, or at least implicitly, reconstruct the contemporary conditions in which political guidance and rule are provided by the executive, rather than representative institutions, and in which law can no longer be understood as a body of rules, but must instead content itself with providing standards which are sufficiently vague to empower policymakers to act according to their understanding of what needs to be done?[126]

---

[122] Ernst Steindorff, *Politik des Gesetzes als Auslegungsmaßstab im Wirtschaftsrecht, in* FESTSCHRIFT KARL LARENZ 217 (1973); Ernst Steindorff, *Wirtschaftsordnung und Steuerung durch Privatrecht?*, *in* FESTSCHRIFT LUDWIG RAISER 621 (1974).

[123] *See generally* GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (2012).

[124] *See* Michael Ioannidis, EU Financial Assistance Conditionality after "Two Pack", 74 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (ZAöRV) (forthcoming 2014); Michelle Everson, An Exercise in Legal Honesty: Re-writing the Court of Justice and the *Bundesverfassungsgericht*, *in* 136 POLITICAL SCIENCE SERIES (Institute for Advanced Studies, Vienna 2014), http://www.ihs.ac.at/publications/pol/pw_136.pdf;

> [C]onditionality irrevocably undermines the status of the Member States as 'Masters of the Treaties' … Just as the Federal Government within Germany respects the democratic integrity of the *Länder* which make up the federal state, the Federal Republic of Germany cannot, in its relations within the European Union, contract with 'slaves'. It cannot enter into partnership with anything other than fully sovereign states.

Id. at 30.

[125] DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 103 (2006).

[126] Eric Posner and Adrian Vermeule have underlined that they seek to reconstruct Schmitt's work in "generizable social-scientific terms"; *see Demystifying Schmitt*, (Harvard Public Law Working Paper No. 10-47, 2010, Univ. of Chicago, Public Law Working Paper No. 333, 2010) *available at*: http://ssrn.com/abstract=1723191.

At this point, the critique must reflect upon its own premises, particularly its assumption that the integrity of law could have been defended. It is precisely this speculation which may be overly simplistic and naïve. But how can this be determined? Perhaps it would be best to step back and observe these issues from a more removed perspective.

E. A Fictitious Debate between Carl Schmitt and Jürgen Habermas

Europe's financial crisis is not an expression of a faulty way of dealing with prevailing law, but an expression of the imperfection of Europe's legal design—including its configuration of the law-politics relationship. A rare, albeit superficial, consensus has emerged regarding this critical evaluation. Beyond this consensus, the crisis has generated challenges for all disciplines engaged in European studies. This is why it would be presumptuous to venture legal and constitutional policy hypotheses here based upon some definite assessment as to the causes of the crisis, as well as forecasts regarding its further course, intending to provide a blueprint for Europe's future constitutional architecture. The following deliberations will examine these ongoing contestations from a distance, in the form of a fictitious debate between Carl Schmitt and Jürgen Habermas. Considering these names, it may be appropriate to begin by stating positions.[127] My personal theoretical home is the discourse theory of law, both in German and European law.[128] It is for an adherent of the Habermasian theory of law and democracy all the more disturbing that Carl Schmitt seems to have gained alarming topicality, not only with his concept of the state of exception and his theorem of a commissarial dictatorship, but also with his theory of the *Großraum* and the diagnosis concerning the "hour of the executive."

I. Carl Schmitt's Shadow over Europe

In view of the European dimension of the financial crisis, it seems best to begin with the theory of the *Großraum*, a notion which was explicitly, albeit not exclusively designed to capture the European constellation Carl Schmitt selected a memorable occasion to present it: From 29 March 1939 to 1 April 1939, still half a year before the war against Poland, but after the *Anschluss* of Austria and the invasion of Bohemia and Moravia (the *Sudetenland*)

[127] An explanatory follow-up to the remarks on *Ersatzunionsrecht in* Part III.1 above may be in place here. For obvious reasons, Germans are particularly concerned about the lasting impact of Schmitt and another "hour of the executive." This is by no means to say that the search for administrative legitimacy of European rule as pursued by Peter L. Lindseth (see the references to his work in footnote 143 and his recent *Equilibrium, Democracy, and Delegation in the Crisis of European Integration*, 15 GERMAN L.J. (2014) or by Deirdre Curtin (see her Chorley Lecture on *The Challenge of Executive Democracy in Europe*, 77 MOD. L. REV. 1, 1-32 (2014) would operate in the shadow of that legacy..

[128] *See* Christian Joerges, *The Science of Private Law and the Nation-State* 47-82 (Florence: European University Institute, Law Department, Working Paper No. 98/4, 1998); Christian Joerges, *Reflections on Habermas' Postnational Constellation*, *in* JÜRGEN HABERMAS, VOL. 2 XI-XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

at the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrer-Bundes* (Reich section of professors in the National Socialist Association of Lawyers) convened in Kiel. Also during this time period, the Institute for Politics und International Law was celebrating its 25th anniversary. Thus, Carl Schmitt gave his lecture entitled "*Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*" (The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law) amidst this momentous setting.[129]

The core argument of Schmitt's key note was that the *jus publicum europaeum*, which had made the sovereign state its central concept, was no longer in line with the *de facto* spatial order of Europe.[130] Following the model of the Monroe Doctrine, a specific "space" (the *Raum*) had to become the conceptual basis for international law, with the *Reich* constituting the order of that space. To quote directly: "The new ordering concept for a new international law is our concept of the *Reich*, with its *Volk*-based, *völkisch Großraum* order." But what does this mean for the internal order of the *Großraum*? Schmitt refers to the elasticity of the concept of international law, which could also cover the inter-*völkische* relations within a *Großraum* as well. What the *Großraum* requires and constitutes is an "order that excludes the possibility of intervention on the part of spatially foreign powers and whose guarantor and guardian is a nation that shows itself to be up to this task."[131]

This claim to leadership was, in Schmitt's words, "situational,"[132] and the overall notion of the *Großraum*, as he underlined in discussions with his Nazi contemporaries, rivals, and

---

[129] The lecture was published as early as April 1939 in the Institute's series; its 4th edition of 1941 refers to translations into five languages. The quotations in the following are either our own translations of the extremely carefully annotated reprint in GÜNTER MASCHKE, CARL SCHMITT, STAAT, GROßRAUM, NOMOS. ARBEITEN AUS DEN JAHREN 1916-1969 269-320 (1995) or, as the title reproduced in this text, CARL SCHMITT, WRITINGS ON WAR 75-124 (Timothy Nunan ed. & trans., 2011).

[130] For more detail on the following, see Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, *in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 167-191 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

[131] *See* CARL SCHMITT, WRITINGS ON WAR 110 (Timothy Nunan ed. and trans., 2011). Contemporary reactions attested to how the theory of the *Großraum* with its "German Monroe doctrine" suited Nazi policy; for this reason, the theory is considered Schmitt's way of indicating his return as a leading legal thinker; *see* LOTHAR GRUCHMANN, NATIONALSOZIALISTISCHE GROßRAUMORDNUNG. DIE KONSTRUKTION EINER "DEUTSCHEN MONROE-DOKTRIN" 11 (1962); WILLIAM E. SCHEUERMAN & CARL SCHMITT: THE END OF LAW 161, 169 (1965).

[132] On the theoretical understanding, but also the determination with which Schmitt championed this claim of leadership, lucidly HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS 215 (1992); later Oliver Eberl, *Großraum und Imperium. Die Entwicklung der 'Völkerrechtlichen Großraumordnung' aus dem Geiste des totalen Krieges*, *in* GROßRAUM-DENKEN. CARL SCHMITTS KATEGORIE DER GROßRAUMORDNUNG 185-206 (Rüdiger Voigt ed., 2008). More complacently, in contrast, see Horst Dreier's appreciation in *Wirtschaftsraum – Großraum – Lebensraum. Facetten eines belasteten Begriffs*, *in* FESTSCHRIFT 600 JAHRE WÜRZBURGER JURISTENFAKULTÄT 47, 66-73 (Horst Dreier, Hans Forkel & Klaus Laubenthal eds., 2002).

critics, was a "concrete, historical and politically contemporary concept" (*konkreter geschichtlich-politischer Gegenwartsbegriff*).[133] But in so doing, he emphasized elements which he claimed to be valid long-term. The obviousness of the *Großraum* concept, he argued, resulted from transformations dominated by technical, industrial, and economic developments. Thus, Schmitt outlined, albeit somewhat apocryphally, an erosion of the territorial state as the harbinger of the necessity to adapt international law to the factual re-structuring of international relations and the replacement of classical international law by norm systems which, today, would affirmatively be called "governance structures," or, distanced and critically, "managerialism."[134] He underlined two phenomena in particular, namely, the economic interdependencies beyond state frontiers (*Großraumwirtschaft*), and the specific dynamics of technology-driven developments ("technicity" [*Technizität*]).[135] Schmitt had already published on both topics prior to 1933.[136]

Schmitt was silent on the internal "order" of the *Großraum* during the years of war. In the 1941 edition of the *Großraum*, he remained sibylline[137] and only published his famous "*Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*" in 1950, which he had written prior to 1945.[138] But the topic continued to haunt him.[139] When considering Schmitt's theories within the context of the financial crisis, not only must his diagnoses of the loss of nation states' sovereignty and the de-legalization of their relationships be taken

---

[133] Schmitt, *supra* note 131, at 107.

[134] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN L. 9, 16 (2007); Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EURO. J. OF INT'L REL. 395, 411 (2009).

[135] Schmitt, *supra* note 131, at 111; *see* JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY 42-46, 92-105 (1997) (noting the technicity).

[136] Infamous and important, Carl Schmitt, *Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern* (delivered on Nov. 23, 1932), 2 VOLK UND REICH 81-94 (1933).

[137] The preliminary remarks to the 4th edition (Berlin 1941) include the famous motto: "We are like mariners on a continuing journey, and no book can be more than a log book."

[138] CARL SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM (1950); CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM (G.L. Ulmen trans., Telos Press 2003).

[139] Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, *in* 17 DER STAAT 321-339 (1978). In this tribute to the French economic theorist François Perroux, who examined apparently related economic dimensions of space, we read at 328:

> Today, the issue is about the political system for society adequate in relation to scientific-technical-industrial developments. Today, the adage *cujus industria, ejus regio* or *cujus regio, ejus industria* applies", and on the following page Schmitt went on: "The industrialised society is bound to rationalisation, including the transformation of law into legality.

seriously. His observations on the increase of executive power—broadly supported by comparative legal research—must also be taken into account.[140] But here, above all, we are concerned with his theorems of the state of emergency[141] and the (commissarial) dictatorship.[142] Ernst-Wolfgang Böckenförde was the first to take up the term "state of emergency,"[143] and others followed. "The European Stability Mechanism," writes Ulrich Hufeld, has "the format of a constitution-breaching measure along the lines of Carl Schmitt's conceptualization of contrasts,"[144] and adds a quotation from Schmitt's 1928 *Constitutional Theory*:

> Such breakout entities are, by nature, measures, not norms . . . . Their necessity arises from the particular circumstances of an individual case, an unexpected abnormal situation. If, in the interest of the whole, such renegade entities are formed, the superiority of the existential over mere normativity is apparent. Whoever authorised such acts and is capable of acting, is sovereign.[145]

In a tone of urgency, Frank Schorkopf calls the calamity that we are dealing with a "crisis without an alternative";[146] a constellation in which the actors, including the governments

---

[140] Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252-288 (1938); on this, of course under the impression of the American understanding of the executive, see PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE 62 (2010). Lindseth has underlined the importance and topicality of this aspect of Schmitt's work already in his essay, Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J., 1343, 1354, 1382 (2004).

[141] JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY 122–156 (1997); Ellen Kennedy, *Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, 'The Dictatorship of the Reich president according to Article 48 R.V.,'* 18 CONSTELLATIONS 284–297 (2011).

[142] CARL SCHMITT, DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF [1921] (1989). As examples of the copious literature compare the explanations in HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS (1992).

[143] Ernst-Wolfgang Böckenförde, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung*, NEUE ZÜRICHER ZEITUNG, June 21, 2010; also Ernst-Wolfgang Böckenförde , *Wissenschaft, Politik, Verfassungsgericht*, *in* 67 JURISTENZEITUNG 197 (2012).

[144] Ulrich Hufeld, *Zwischen Notrettung und Rütlischwur: der Umbau der Wirtschafts- und Währungsunion in der Krise*, 34 INTEGRATION 117, 122 (2011).

[145] CARL SCHMITT, VERFASSUNGSLEHRE 107 (1928) (this author's translation, 2010).

[146] Frank Schorkopf, *Gestaltung mit Recht – Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 136, 323, 341 (2011); Frank Schorkopf, *Finanzkrisen als Herausforderung der*

and the executive branches, "merely have power within the existing conditions, but not over them."[147] Anna-Bettina Kaiser arrives at her position following a precise reconstruction of the debates around Article 48(2) of the Weimar Constitution.[148] The handling of this provision and the extensive interpretation of Article 122(2) TFEU today are in her view equally dubious and can be placed at the same level.[149] Furthermore, the rules laid down in the Six-Pack, the Two-Pack, and the TSCG must not be sugar-coated.[150] Yet, is the academic community fulfilling its responsibility by merely accepting that the provisions of the EMU are dysfunctional, and abstracting from the dilemma of the political in the EU?

We cannot escape from Carl Schmitt's shadow that easily. The concept of "commissarial dictatorship" is most plausible to except to. After all, in the current management of the crisis, the actors are not alone. They must not only come to an arrangement at a supranational level, but also between the levels of the multilevel governance system, as well as internationally—the dictator has been replaced by technicity. But how comforting is this? The fact remains that the new form of European government collides with democratically-legitimized institutions and processes. Thus, it is anything but comforting that the new European practice coincides with ideas of prominent American constitutionalists who draw upon Carl Schmitt in order to turn away from James Madison and argue the case for a plebiscitary democracy in place of a representative one; theorists who advocate delegating political power to the executive in case of need.[151] And are we,

---

internationalen, europäischen und nationalen Rechtssetzung, 71 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 183 (2012).

[147] *Id.* at 225.

[148] Anna-Bettina Kaiser, *Die Verantwortung der Staatsrechtslehre in Krisenzeiten – Art. 48 WRV im Spiegel der Staatsrechtslehrertagung und des Deutschen Juristentages 1924*, *in* ZUR AKTUALITÄT DER WEIMARER STAATSRECHTSLEHRE 119–142 (Ulrich Jan Schröder & Antje V. Ungern-Sternberg eds., 2011).

[149] *Id.* at 140.

[150] *See supra* Parts D.III & D.IV.

[151] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND. AFTER THE MADISONIAN REPUBLIC 8 (2010): "When emergencies occur, legislatures acting under real constraints of time, expertise, and institutional energy typically face the choice between doing nothing at all or delegating new powers to the executive to manage the crisis." This book is riddled with such pronouncements; on this, see NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE 171–227 (2012); for a critical discussion of the empirical dimensions and claims of *The Executive Unbound*, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012). In an earlier essay, Posner and Vermeule have underlined that they seek to re-construct Schmitt's work in "generizable social-scientific terms"; see Posner & Vermeule, *supra* note 126. I am by no means the only one to underline, and to relativize, the topicality of Schmittian notions in the present state of the European project: "Without a modicum of legitimacy derived from any European treaties, the austerity dictates of the Troika (comprised of the EU, the ECB, and the IMF) have insinuated themselves as the sovereign acts in the distinctly Schmittian sense of the term, *i.e.*, as extra-legal decisions on the exception." *Id.* Thus, Michael Marder, *Carl Schmitt and the De-Constitutionalisation of Europe*, contribution to Conference on "Europe after the Euro-crisis: Legitimacy, Democracy and Justice, organised by the Institute for Democratic Governance, Bilbao, September 2–3, 2013 (ms. on file with the author).

perhaps, exchanging Scylla for Charybdis? Anyone who observes the busy activities of the Commission's Services—their tireless production of additional lists of criteria for ever-more policy fields, in ever-more regions—will remember Carl Schmitt's words about the "total," but by no means "strong" state, which he linked with a polemic against all technocratic efforts that believe they can decide "all issues according to technical and economic expert knowledge following supposedly purely substantive, purely technical and purely economic considerations."[152] Ironically, Schmitt's late essay,[153] quoted above, provides a situational, theoretical interpretation of this. Reading Hans Peter Ipsen's 1,000-page tome on European law, Schmitt confessed, he was "stricken with deep sorrow," for the following reason: the approach of European law, which "legalizes" a technocratic-functional administration of European associations, has no concept of a "legitimate political" project.[154] Therefore, one cannot speak of the rule of law (*Rechtsstaatlichkeit*), much less of democracy. Now, one must take into account what *Rechtsstaatlichkeit*[155] and democracy meant to Schmitt. In *Constitutional Theory*, he writes that democracy "is a state form that is consistent with the principle of identity (e.g., of the concretely existing people identified with itself as a political unit)"—and consequently, it cannot apply to an ethnically diverse Europe.[156] After all this, Jürgen Habermas' reply is all the more important.[157]

---

[152] Carl Schmitt, *Die Wendung zum totalen Staat* (The turn to the total state), *reprinted in* CARL SCHMITT: *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENF-VERSAILLES, 1923-1939,* 146–153 (*1988*) (quoted according the the reprint). On this see also CARL SCHMITT, DER HÜTER DER VERFASSUNG 78 (1969); on this WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 85 (1965).

[153] Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, 17 DER STAAT 335 (1978).

[154] Italics are use for German terms and a book title Italics added. On the recourse to the duality of legality and legitimacy in the present context, see Reinhard Mehring, *Der 'Nomos' nach 1945 bei Carl Schmitt und Jürgen Habermas*, *in* FORUM HISTORIAE IURIS, paras. 20–26.

[155] On the theory of the *Rechtsstaat*, see INGEBORG MAUS, RECHTSTHEORIE UND POLITISCHE THEORIE IM INDUSTRIEKAPITALISMUS 40 (1986). Schmitt's differentiation of the categories of "formal" and "political" concepts of law and legislation, see CARL SCHMITT, VERFASSUNGSLEHRE 143 (1928) (reprinted in 2010), between the generality of laws and the concrete political act of will, leads him to executive and governmental law-making in the Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252 (1938); *see* HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS 83 (1992).

[156] CARL SCHMITT, VERFASSUNGSLEHRE 223 (1928) (reprinted in 2010); see Ulrich K. Preuß, *Die Weimarer Republik – ein Laboratorium für neues verfassungsrechtliches Denken, in* METAMORPHOSEN DES POLITISCHEN: GRUNDFRAGEN POLITISCHER EINHEITSBILDUNG SEIT DEN 20ER JAHREN 177, 180. (Andreas Göbel ed., 1995).

[157] This exploration is no contribution to the *les-extrêmes-se-touchent* debate around the relationship of Habermas to Schmitt [for an attempt to update it, see Ernst Vollrath, *Proteus und Medusa. Die politische Apperzeption der deutschen Staatsrechtslehre im Werk von Jürgen Habermas*, 37 POLITISCHE VIERTELJAHRESSCHRIFT 197 (1996); *see also* Reinhard Mehring, *Der 'Nomos' nach 1945 bei Carl Schmitt und Jürgen Habermas*, *in* FORUM HISTORIAE IURIS, para. 26.

II. The Crisis as Opportunity According to Jürgen Habermas

In view of the crisis, Jürgen Habermas has brought his prestige and powerful eloquence to bear. His countless public interventions have been published across Europe in many languages. "Democracy is at stake," he has warned time and time again,[158] and Europe risks establishing a post-democratic regime of "executive federalism."[159] These drastic messages, though, are always accompanied by signals of hope and political appeals. He intends listeners to view the crisis as an opportunity to strengthen the European project. The "strength" which he advocates is not merely Europe's managerial potential; to Habermas, "more Europe" also means a deepening of Europe's democratic credentials.

In contrast to so many commentators on the debate regarding the financial crisis and the future of Europe, in his passionate pronouncements Habermas pursues a demanding and coherent agenda based upon his long-term explorations of the many facets of the European project. His work on this theoretical basis started with the essay *Citizenship and National Identity*,[160] just prior to the publication of his *magnum opus* on legal theory.[161] Since then, Habermas has ceaselessly occupied himself with the European project, both as a citizen and a theoretician. As a theoretician, he conceives of the process of Europeanization as a challenge to his theory of the democratically constituted nation-state; from the perspective of the citizen, he views the process as a response to the catastrophes of the Twentieth century, for which Germany bears so much responsibility. This intent is manifested in the project, as well as the objective to defend democratic welfare-state accomplishments in the processes of globalization and European integration. As a theoretician on the constitutionalization of Europe, Habermas seeks to accomplish a type of analysis that not only grasps the facticity of the processes of Europeanization, but also achieves a normative concept that both provides criteria and identifies the institutional

[158] *See e.g.*, *Rettet die Würde der Demokratie*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 4, 2011. A number of these statements are reprinted in JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS: EIN ESSAY 97-129 (2011); a more recent example can be found in his essay in *Le Monde* of Oct. 27, 2011 (English version available at http://www.presseurop.eu/en/content/article/1106741-juergen-habermas-democracy-stake). Habermas' entire work is comprehensively documented and updated weekly in the Habermas Forum: http://www.habermasforum.dk, the most recent being, Jürgen Habermas, *Merkel's European Failure: Germany Dozes on a Volcano*, *in* DER SPIEGEL, 5 (July 2013). A great number of his pertinent essays haverecently been reprinted in the Journal *Blätter für deutsche und internationale Politik* 3/2014, 85–416 under the title *Drer Aufklärer Jürgen Habermas* at the occasion of his 85th birthday on June 18, 2014. They can be downloaded freely at http://habermas-rawls.blogspot.dk/2014/06/e-book-der-aufklarer-jurgen-habermas.html.

[159] *See* Jürgen Habermas, *A Pact for or against Europe?* in WHAT DOES GERMANY THINK ABOUT EUROPE? 83–89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

[160] Jürgen Habermas, *Citizenship and National Identity, in* STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT (1991), *reprinted in* BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 491–516 (1999).

[161] *Id.* In German: FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992).

conditions for the question of whether the configurations emerging in the process of Europeanization "deserve recognition."[162]

Following his more recent interventions as a citizen, Habermas has approached this aspiration again.[163] He identifies the institutional causes for the crisis and states his polemics against the crisis management in Europe in terminology that critically transforms Schmitt's affirmative observations on the steadily growing power of the executive into critical objections to the present course of the process of Europeanization.[164] "Post-democratic executive federalism" is the term he uses to denote—and to criticize—Europe's *praxis*.[165] The European Union must not continue on the path it has taken due to the pressure of the crisis, but cease to coordinate the relevant policies in the gubernative/governative-bureaucratic style which has been customary until now and take the path of adequate democratic legalization.

The theoretical core of Habermas's essay is found in the reasons he gives for this postulate, in which Habermas specifically continues deliberations by Armin von Bogdandy, Claudio Franzius, and Ulrich K. Preuß.[166] He places a dual role for Europe's citizens alongside the recognition that these rights are equally rooted in the democratic constitutional state: They remain citizens of their states, but become citizens of the Union as well. With this construct, Europe's ability to be a democracy becomes more theoretically plausible. In addition, however, the construct promises to provide criteria for democratic constitutionalization of European governance and to come to terms with its functional requirements. But it is precisely at this point that it remains under specified. It is difficult to imagine which institutional architecture might satisfy Habermas's normative ideas.[167] As

[162] For a reconstruction of Habermas' works, which, however, seeks to (re-) interpret the author for his own ends, see Christian Joerges, *Reflections on Habermas' Postnational Constellation*, *in* JÜRGEN HABERMAS, VOL. 2 XI–XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

[163] Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EURO. J. OF INT'L L. 335, 335-348 (2012). One can no longer be sure about the seriousness of this distinction. In the preface to his most recent book, JÜRGEN HABERMAS, IM SOG DER TECHNOKRATIE. KLEINE POLITISCHE SCHRIFTEN XII 8 n. 2 (2013), Habermas expresses some discontent with the fact that his public interventions did not make it into the general academic discourses.

[164] *Pringle*, CJEU Case C-370/12 at para. 296.

[165] *See, e.g.*, Jürgen Habermas, *Bringing the Integration of Citizens into Line with the Integration of States*, 18 EURO. L. J. 485, 487 (2012).

[166] *See* Armin von Bogdandy, *Basic Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 13, 44 (Armin von Bogdandy & Jürgen Bast eds., 2010); CLAUDIO FRANZIUS, EUROPÄISCHES VERFASSUNGSDENKEN 49 (2010); CLAUDIO FRANZIUS & ULRICH K, PREUß, DIE ZUKUNFT DER EUROPÄISCHEN DEMOKRATIE 33 (2012).

[167] *See* Nicole Scicluna, EU Constitutionalism in the Twenty-first Century: Politics and Law in Crisis 101 (2013) (unpublished Ph.D Thesis, La Trobe University):

long as extreme uncertainties as to the causes of the crisis and the possibility of its democratic cure persist, it is even more difficult to understand which kind of practical guidance they might provide. We are witnessing instead a reemergence of age-old animosities in Europe's publics, the rise of populist movements and an erosion of the legitimacy of the governments in precisely those countries most deeply affected by the crisis. It remains unclear how a political European leadership with secure democratic legitimation could be established. "Until these questions and problems are addressed," American political scientist John McCormick noted in much more tranquil times, "Schmitt's work and career haunts the study of European integration like a spectre."[168]

F. Epilogue: From "One Size Fits All" to "Unity in Diversity!"

The debate on the transformation of Europe's constitutional constellation, its new *Verfassungswirklichkeit*,[169] has only just begun and is bound to continue. Pertinent characterizations oscillate between Executive Federalism (Jürgen Habermas),[170] a Distributive Regulatory State or New Sovereignty with Largely Unfettered Power of Rule (Damian Chalmers),[171] a *Konsolidierungsstaat* (Consolidating State, Wolfgang Streeck),[172] Authoritarian Managerialism (Christian Joerges and Maria Weimer),[173] an Unconstrained

---

> So far it has proved difficult, if not impossible, to have a full and inclusive debate on the lofty ideal of 'political union' while the Eurozone crisis is still in its emergency phase. As long as this state of emergency persists, European politicians and officials will continue to be heavily focused on the pragmatic, day-to-day steps that (in their opinions) are necessary to save it.

See also Nicole Scicluna, *EU constitutionalism in flux? Is the Eurozone crisis precipitating centralisation or diffusion?*, 18 EURO. L. J. 489, 500 (2012).

[168] John P. McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, *in* DARKER LEGACIES OF L. IN EURO. 133, 141 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

[169] The contrast between *Verfassungsrecht* (constitutional law) and *Verfassungsswirklichkeit* (constitutional reality) is another problematical German legacy—again with root in CARL SCHMITT, VERFASSUNGSLEHRE 107 (1928) (reprinted in 2010).

[170] Jürgen Habermas, *A Pact for or against Europe?*, *in* WHAT DOES GERMANY THINK ABOUT EUROPE? 83–89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

[171] Damian Chalmers, *The European Redistributive State and the Need for a European Law of Struggle*, 18 EUROPEAN LAW JOURNAL 667 (2012) and Damian Chalmers, *European Restatements of Sovereignty*, (LSE Working Paper No. 10, 2013).

[172] WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM 97–164 (2014).

[173] Christian Joerges and Maria Weimer, *A Crisis of Executive Managerialism in the EU*: *No Alternative?* (2012).

Expertocracy (Fritz W. Scharpf),[174] an Unbound Executive (Deirdre Curtin),[175] and *Krisenkapitalismus* (Crisis Constitutionalism, Hans-Jürgen Bieling).[176] None of these characterizations are in line with the ever-so positive and optimistic presentation of the integration project which we have been reading for decades.[177] Among the features underlined include the lack of a theoretical/conceptual paradigm; a radical disregard of Friedrich A. von Hayek's warnings against the "pretence of knowledge,"[178] a disregard of the rule of law, and a thorough de-legalization of governance.[179]

What does all this mean for European citizenship? What was once a cherished accomplishment is now characterized by inequalities between the North and the South, the social exclusions of a large part of the European population, and political disempowerment. The present calamities are not without precursors,[180] but the ambivalences of the vision of transnational, albeit nationally dis-embedded, citizenship have, by now, become increasingly apparent and disquieting. I am not trying to go, in this already overly lengthy paper, into any detailed analysis and refer instead to the contributions by Giubboni.[181] Just as it is misconceived to subject a socio-economically and politically diverse Union to the discipline of one currency, the construction of a uniform "European social model" is a similarly misconceived project.[182]

---

[174] Fritz W. Scharpf, *Political Legitimacy in a Non-optimal Currency Area*, in Adjusting to European Diversity: ADJUSTING TO EUROPEAN DIVERSITY: THE END OF THE EUROCRATS' DREAM (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges eds. (forthcoming 2015).

[175] Deirdre Curtin, *The Challenge of Executive Democracy in Europe*, 77 MODERN L. REV. 1, 1–32 (2014).

[176] Hans-Jürgen Bieling, *Das Projekt der Euro-Rettung und die Widersprüche des europäischen Krisenkonstitutionalismus*, 20 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 89, 89–103 (2013).

[177] For a critique of the European "political culture of total optimism" and its weak underpinnings, see Giandomenico Majone, RETHINKING THE UNION OF EUROPE POST-CRISIS. HAS INTEGRATION GONE TOO FAR? 74–80 (2014).

[178] Friedrich A. von Hayek, Nobel Memorial Lecture (Dec. 11, 1974), http://pavroz.ru/files/hayekpretence.pdf.

[179] This is why law should not be called the culprit here; but see K.A. Armstrong, *New Governance and the European Union: An Empirical and Conceptual Critique*, *in* CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK n. 10 and accompanying text (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244762-.

[180] *See* Michelle Everson, *A very cosmopolitan citizenship; but who pays the price? in* MICHAEL DOUGAN, NIAMH NIC SHUIBHNE AND ELEANOR SPAVENTA, EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN 145 (2013).

[181] Stefano Giubboni, *European citizenship, labour law and social rights in times of crisis?,* this GLJ Special Issue.

[182] It is worth noting that very similar disappointments are also becoming a concern in the accession states; see for an instructive analysis Bojan Bugaric, *Europe Against the Left? On Legal Limits to Progressive Politics* (LEQS Paper No. 61, 2013).

All foregoing, disheartening diagnoses notwithstanding, this epilogue should not conclude without an outline of what has been announced in the introductory remark: "But where danger threatens, that which saves from it also grows."[183] The present state of the Union is unsustainable. The efforts to force Member States and their citizens into the straitjacket of new economic governance are bound to fail. The Euro-crisis, somewhat paradoxically and inadvertently, underlines the urgent need for pluralistic variety—the toleration of disagreement and contestation—rather than an ever-more centralized executive Europe. The failures of Europe generate growing unrest and protest among dis-empowered citizens who are exposed to austerity measures, experienced as hopeless, and, to a considerable degree, useless suffering. They increasingly provoke the political public, national parliaments, and even the EP. It will become progressively more apparent that it is impossible for the great majority of signatories of the Fiscal Compact to comply with the requirements imposed upon them. It will also become ever more apparent that it is simply impracticable for the great majority of signatories to comply with the requirements imposed upon them, and the "*die neue Umständlichkeit*" (cumbersomeness) of all these procedures will affect their impact.[184]

Hence, there is room for maneuver. And yet, to date, any substantial transformation of the established regime remains out of sight. Is it nevertheless conceivable that, in the not-too-distant future, the new policy coordination within the annually repeating European Semester, the reporting and multilateral surveillance obligations, the macro-economic imbalance procedures, and the responses to country-specific recommendations will lead to new assessments of the weight of socio-economic diversity. Growing awareness of the social embeddedness of markets, acknowledgement of the different regulatory, social, and economic cultures in the Member States, may well generate a search for innovative responses to Europe's complex conflict constellations—and sooner or later, even to the developments of standards and criteria which discipline authoritarian managerialism.

It would be absurdly pretentious to promise a "solution" to these difficulties. But we must not shy away from the construction of projects which seek to respond to the problems which we have identified. The project which I have pursued for more than a decade is "conflicts-law constitutionalism."[185] Its analytical and normative core can be briefly summarized as follows: As long as the shape of a pan-European democracy lacks contours, and the conditions for its realization remain entirely unclear, we must explore alternatives which take the difficulties the European project must not, and cannot, avoid into account.

---

[183] FRIEDRICH HÖLDERLIN, note 9 *supra.*

[184] For a thorough reconstruction see BEATE BRAAMS, KOORDINIERUNG ALS KOMPETENZKATEGORIE 15–49 (2013).

[185] *See supra* notes 31 & 33. For an evaluation see the contributions in *Conflicts Law as Constitutional Form in the Postnational Constellation,* 2:2 TRANSNATIONAL LEGAL THEORY (Christian Joerges, Poul F. Kjaer & Tommi Ralli eds., 2011). The core premises of the approach are explained in the introductory chapter by the three editors on "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation," 153–165.

How should we respond to the reality that the socio-economic disparities in the expanded Union are not melting away? Which conclusions should be drawn from the insight that the neo-liberal interventions to which the "varieties of capitalism" in the Union have been exposed have repeatedly disintegrative effects? If it is impossible to construct a uniform welfare-state model, is it then advisable to dismantle Europe's welfare-state traditions altogether? If it is not our goal to suppress the painful memories of Europeans, to not iron out the differences between their bitter historical experiences, to not waste the wealth of their cultures, must not tolerance therefore determine the status of European citizens, tolerance which is established in law and based upon the principle of mutual acceptance? These questions are not merely rhetorical. They have a normative point of reference in the optimistic "motto" of the ill-fated Treaty establishing a Constitution for Europe as "United in Diversity,"[186] which need not remain an empty phrase. My proposal for putting this motto into practice is as follows: Europe must find its constitutional form in a new type of "conflicts law," which is characterized by two guiding principles. Firstly, the supranational European conflict of laws is to require Member States of the Union to take their neighbors' concerns seriously—in this respect, it aims at compensating the structural democratic deficits of nation-statehood. Secondly, this European conflicts law should structure cooperative solutions to problems in specific areas—thereby reacting to the inter-dependencies of modern societies. Suffice it here to underline three points.

We should shift our attention from the democratic deficit of the EU to the structural democracy deficit of its Member States. Nation states continuously, and unavoidably, violate the principle that those affected by their laws can "in the last instance" understand themselves as their authors. The Member States of the Union can be requested to take the impact of their own policies on other jurisdictions into account and *vice versa*—they can expect that their concerns be included in the decision-making processes of the others. In the Union, these commandments correspond to the common commitments to democracy which European law is legitimated to implement. European law has the vocation, and some potential, to compensate these deficits. It can derive its legitimacy from its capacity to correct the democracy deficits of Member States.[187]

---

[186] Draft European Constitutional Treaty arts. 1–8 (Dec. 16, 2004).

[187] It seems worth noting that Habermas expresses the same ideas in his recent work on the constitutionalisation of international law:

> Nation-states . . . encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level.

See Jürgen Habermas *Does the Contitutionalization of International Law still have a Chance?*, in JÜRGEN HABERMAS, THE DIVIDED WEST 113, 176 (Ciaran Cronin trans., 2007).

The second vocation and task stems from the erosion of the potential of the nation state to resolve problems autonomously. In the Union, this dependence upon the other transforms itself into duties of cooperation which European law is legitimated to organize. The "constitutionalization of co-operation"[188] must then seek to derive its validity from the normative credentials of the very interactions that it organizes.

Conflicts-law constitutionalism was meant to be elaborated further and to proceed as a "re-constructive project." For example, a re-conceptualization of European law which would, to a considerable degree, be compatible with European law as it stood, and be able to orient its further development. The re-constructive status was based upon its sociological premises which reflect the European constellation more adequately than the orthodoxy of European law. It seems, indeed, overdue to reconsider the integration project in the light of Europe's ever-growing diversity, to take the conflicts which this diversity generates into account, and to re-orient Europe's agenda from harmonization and unity to the management of complex conflict constellations.

The last point is the most difficult to defend. The reconstructive status of the conflicts-law approach was based on its sociological premises which reflect the conflict-laden European constellation more adequately than the orthodoxy of European law. All that seemed needed, and indeed overdue, was to reconsider the integration project in the light of Europe's ever growing diversity, to take the conflicts which this diversity generated into account, and to re-orient Europe's agenda from harmonization and unity to the management of complex conflict constellations. Following the financial crisis, such hopes and ambitions are obviously unrealistic, with substantial backing in already existing European law. This bold assertion has suffered numerous setbacks. For example, through the de-legalization and de-formalization of European governance.[189] At present, under the pressures of European crisis management, it continues to dwindle, and conflicts-laws constitutionalism is, for the time being, a merely critical project.[190] What can nevertheless be explored are the conflict constellations which the new modes of economic governance and the imposition of austerity politics on a large part of the Union generate—together with the space for counter-movements which the unfortunate state of the Union may generate. That, although, requires another project.

---

[188] *See* Christian Joerges, Poul F. Kjaer & Tommi Ralli *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, *in* CONFLICTS LAW AS CONSTITUTIONAL FORM IN THE POSTNATIONAL CONSTELLATION, 2:2 TRANSNATIONAL LEGAL THEORY 159–160.

[189] *See supra* notes 73, 76.

[190] *See* Christian Joerges & Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative*?, *in* CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK 295 (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013).